DOCKET

SUPREME COURT
OF THE UNITED STATES

No. 09-115
Title: Chamber of Commerce of the United States, et al., Petitioners
v.
Michael B. Whiting, et al.
Docketed: July 28, 2009
Linked with 08A1076
Lower Ct: United States Court of Appeals for the Ninth Circuit
Case Nos.: (07-17272, 07-17274, 08-15357, 08-15359, 08-15360)
Decision Date: March 9, 2009
Questions Presented

---Date---	--------Proceedings and Orders----------
May 28 2009	Application (08A1076) to extend the time to file a petition for a writ of certiorari from June 7, 2009 to August 6, 2009, submitted to Justice Kennedy.
Jun 2 2009	Application (08A1076) granted by Justice Kennedy extending the time to file until July 24, 2009.
Jul 24 2009	Petition for a writ of certiorari filed. (Response due August 27, 2009)
Aug 18 2009	Order extending time to file response to petition to and including September 28, 2009, for all respondents.
Aug 27 2009	Brief amici curiae of Business Organizations filed.
Aug 27 2009	Brief amici curiae of National Employment Law Project, et al. filed.
Aug 27 2009	Brief amici curiae of Asian American Justice Center, et al. filed.
Sep 28 2009	Brief of respondents Janice K. Brewer, Arizona Governor, et al. in opposition filed.
Oct 13 2009	Reply of petitioners Chamber of Commerce of the United States, et al. filed. (Distributed)
Oct 14 2009	DISTRIBUTED for Conference of October 30, 2009.
Nov 2 2009	The Solicitor General is invited to file a brief in this case expressing the views of the United States.
May 28 2010	Brief amicus curiae of United States filed.
Jun 7 2010	Supplemental brief of petitioners Chamber of Commerce of the United States, et al. filed. (Distributed)
Jun 8 2010	DISTRIBUTED for Conference of June 24, 2010.
Jun 17 2010	Supplemental brief of respondents Janice K. Brewer, Arizona Governor, et al. filed. (Distributed)
Jun 28 2010	Petition GRANTED.
Jul 13 2010	Record received from U.S.D.C. for District of Arizona. (1 envelope)
Jul 15 2010	Record received from U.S.C.A. for 9th Circuit. (1 envelope)
Jul 30 2010	Consent to the filing of amicus briefs, in support of either party or of neither party, received from counsel for the petitioner.
Jul 30 2010	Consent to the filing of amicus briefs, in support of either party or of neither party, received from counsel for respondents.
Aug 2 2010	The time to file the joint appendix and petitioners' brief on the merits is extended to and including September 1, 2010.
Aug 2 2010	The time to file respondents' brief on the merits is extended to and including October 21, 2010.
Sep 1 2010	Joint appendix filed. (Statement of Costs received.)
Sep 1 2010	Brief of petitioners Chamber of Commerce of the United States, et al. filed.
Sep 7 2010	SET FOR ARGUMENT ON Wednesday, December 8, 2010.
Sep 7 2010	Justice Kagan is recused in this case.
Sep 8 2010	Brief amicus curiae of United States filed.
Sep 8 2010	Brief amici curiae of Business Organizations filed.

Sep 8 2010	Brief amici curiae of Representative Romano L. Mazzoli, et al. filed.
Sep 8 2010	Brief amici curiae of Asian American Justice Center, et al. filed.
Sep 8 2010	Brief amici curiae of National Immigrant Justice Center, et al. filed.
Sep 8 2010	Brief amicus curiae of Equal Employment Advisory Council filed.
Sep 8 2010	Brief amicus curiae of Service Employees International Union filed.
Oct 8 2010	CIRCULATED
Oct 21 2010	Brief of respondents Michael B. Whiting, et al. filed. (Distributed)
Oct 27 2010	Motion of the Acting Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument filed.
Oct 27 2010	Brief amicus curiae of Immigration Reform Law Institute filed. (Distributed)
Oct 28 2010	Brief amicus curiae of American Center for Law and Justice filed. (Distributed)
Oct 28 2010	Brief amicus curiae of American Unity Legal Defense Fund filed. (Distributed)
Oct 28 2010	Brief amicus curiae of NumbersUSA Education & Research Foundation filed. (Distributed)
Oct 28 2010	Brief amicus curiae of Eagle Forum Education & Legal Defense Fund filed. (Distributed)
Oct 28 2010	Brief amicus curiae of State Senator Russell Pearce filed. (Distributed)
Oct 28 2010	Brief amici curiae of Missouri, et al. filed. (Distributed)
Nov 15 2010	Motion of the Acting Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument GRANTED. Justice Kagan took no part in the consideration or decision of this motion.
Nov 22 2010	Reply of petitioners Chamber of Commerce of the United States, et al. filed. (Distributed)
Dec 8 2010	Argued. For petitioners: Carter G. Phillips, Washington, D. C., and Neal Kumar Katyal, Acting Solicitor General, Department of Justice, Washington, D. C. (for United States, as amicus curiae.) For respondents: Mary R. O'Grady, Solicitor General, Phoenix, Ariz.

PETITION FOR WRIT OF CERTIORARI

Supreme Court, U.S.
FILED
09-115 JUL 24 2009
OFFICE OF THE CLERK

No. 09-

IN THE

Supreme Court of the United States

CHAMBER OF COMMERCE
OF THE UNITED STATES OF AMERICA *et al.*,
Petitioners,

v.

CRISS CANDELARIA *et al.*,
Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether an Arizona statute that imposes sanctions on employers who hire unauthorized aliens is invalid under a federal statute that expressly "preempt[s] any State or local law imposing civil or criminal sanctions (other than through licensing and similar laws) upon those who employ, or recruit or refer for a fee for employment, unauthorized aliens." 8 U.S.C. § 1324a(h)(2).

2. Whether the Arizona statute, which requires all employers to participate in a federal electronic employment verification system, is preempted by a federal law that specifically makes that system voluntary. 8 U.S.C. § 1324a note.

3. Whether the Arizona statute is impliedly preempted because it undermines the "comprehensive scheme" that Congress created to regulate the employment of aliens. *Hoffman Plastic Compounds, Inc.* v. *NLRB*, 535 U.S. 137, 147 (2002).

PARTIES TO THE PROCEEDING

Petitioners which were plaintiffs/appellants below are Chamber of Commerce of the United States of America; Arizona Contractors Association; Arizona Chamber of Commerce; Arizona Employers for Immigration Reform; Arizona Farm Bureau Federation; Arizona Hispanic Chamber of Commerce; Arizona Landscape Contractors Association; Arizona Restaurant and Hospitality Association; Arizona Roofing Contractors Association; Associated Minority Contractors of America; Chicanos Por La Causa; Somos America; Valle Del Sol, Inc.; National Roofing Contractors Association; and Wake Up Arizona! Inc.

Respondents who were defendants/appellees below are Criss Candelaria; Kenny Angle; Melvin R. Bowers Jr.; Martin Brannan; James Currier; Daisy Flores; Fidelis V. Garcia; Gale Garriott; Terry Goddard; Terrence Haner; Barbara Lawall; Janet Napolitano; Sheila Polk; Derek D. Rapier; Ed Rheinheimer; George Silva; Jon Smith; Matthew J. Smith; Andrew P. Thomas; and James P. Walsh.

There are no parent corporations or publicly held corporations that own 10% or more of the stock of any of Petitioners.

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PETITION FOR A WRIT OF CERTIORARI

Petitioners are business, community-based, and civil rights organizations that hereby petition for a writ of certiorari to review the decision and judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The opinions of the United States District Court for the District of Arizona are published at 534 F. Supp. 2d 1036 and 526 F. Supp. 2d 968, and are reproduced at Pet. App. 49a-94a, 95a-126a. The opinion of the Ninth Circuit, which was captioned *Chicanos Por La Causa* v. *Napolitano*, is published at 544 F.3d 976, and reproduced at Pet. App. 26a-48a. The Ninth Circuit's order amending its opinion, and denying rehearing and rehearing en banc, is published at 558 F.3d 856, and reproduced at Pet. App. 1a-25a.

JURISDICTION

The Ninth Circuit entered judgment on September 17, 2008. A timely petition for rehearing and rehearing en banc was denied on March 9, 2009. On June 2, 2009, Justice Kennedy granted an extension of time to and including July 24, 2009, to file a petition for a writ of certiorari. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL, STATUTORY, AND REGULATORY PROVISIONS

The Supremacy Clause of the United States Constitution provides, in pertinent part, that "the Laws of the United States ... shall be the supreme Law of the

Land ... any Thing in the Constitution or Laws of any State to the Contrary notwithstanding." U.S. Const. art. VI, cl. 2.

Relevant provisions of the Immigration Reform and Control Act of 1986 (IRCA), Pub. L. No. 99-603, 100 Stat. 3359, codified at 8 U.S.C. § 1324a, are reproduced at Pet. App. 127a-47a. Relevant provisions of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), Pub. L. No. 104-208, 110 Stat. 3009, are set forth in a note to 8 U.S.C. § 1324a, and are reproduced at Pet. App. 147a-68a.

Relevant provisions of the Legal Arizona Workers Act, Ariz. Rev. Stat. §§ 23-211 to 23-216, are reproduced at Pet. App. 169a-92a.

INTRODUCTION

This case involves a question of exceptional national importance: whether state legislatures and municipal governments may override Congress's judgment concerning United States immigration policy. Plainly they may not. This Court has made clear that federal law creates a "comprehensive scheme" for regulating the employment of aliens and the verification of immigration status. *Hoffman Plastic Compounds, Inc.* v. *NLRB*, 535 U.S. 137, 147 (2002). And, with one tightly circumscribed exception, IRCA expressly preempts state laws that would regulate in this field. 8 U.S.C. § 1324a(h)(2).

In contravention of these clear directives, state legislatures and municipal governments across the country are seeking to regulate the employment of aliens. In the first three months of 2009 alone, over 1,000 immigration-related bills and resolutions were introduced, in all 50 states. At least 150 of these bills related specifically to employment, and 40 such bills

have been enacted in 28 states since 2007.[1] The result is a "cacophony" of state immigration laws,[2] which are disrupting the congressional plan to comprehensively and "uniformly" regulate status verification and employment of immigrants. IRCA § 115, 100 Stat. at 3384. During the presidential campaign, then-Senator Obama properly described these statutes as "unconstitutional and unworkable," noting that they "underscore[] the need for comprehensive immigration reform so local communities do not continue to take matters into their own hands."[3]

At issue here is the "Legal Arizona Workers Act." Pertinent here, this statute imposes sanctions on employers that knowingly hire unauthorized workers, and requires all Arizona employers to use "E-Verify," a federally administered electronic employment verification system (which formerly was known as the "Basic Pilot Program"). In the decision below, the Ninth Circuit held that these provisions are not preempted, notwithstanding that IRCA expressly prohibits states from regulating the employment of aliens, see 8 U.S.C § 1324a(h)(2), and notwithstanding that IIRIRA explicitly provides that the use of E-Verify is voluntary, see IIRIRA § 402. It did so by transforming the narrow savings clause in the statute's preemption provision for "licensing and similar laws"

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[1] *See* Nat'l Conf. of State Legislatures, *2009 Immigration-Related Bills and Resolutions in the States* (Apr. 22, 2009), *at* http://www.ncsl.org/documents/immig/2009ImmigFinalApril22009.pdf.

[2] *See* Pew Research Ctr., *State of the States Report–2008* at 56-62, *available at* http://archive.stateline.org/flashdata/StateOfTheStates2008.pdf.

[3] Stephen Dinan, *Judge Overturns Hazleton's Law Targeting Illegals*, The Washington Times, July 27, 2007, at A05.

into a gaping loophole that would upend the system Congress enacted.

Review by this Court is appropriate now and in this case. Without immediate action by this Court, the crazy-quilt of state and local immigration statutes will continue to expand, multiplying burdens on employers and unfairness to employees. The result will be a flood of lawsuits, years of litigation, and an unnecessary waste of judicial, legislative, and executive resources. This case is a particularly good vehicle to address these issues, because it presents two questions—the scope of § 1324a's preemption provision and savings clause, and whether states may require the use of E-Verify—that are implicated by many of the state and local enactments and proposed legislation. The Arizona statute's reliance on a *state* determination of immigration status, in the absence of a prior *federal* adjudication, likewise is an important federal question implicating the scope of federal immigration statutes and regulations. And, the decision below threatens to undo Congress's careful and deliberate crafting of a "comprehensive scheme" regulating the employment of aliens. *Hoffman*, 535 U.S. at 147.

The severity of the broader national problem—and in particular the burdens on employers who must meet different and sometimes conflicting laws in numerous jurisdictions—is reflected in the broad coalition supporting this petition. Business, labor, and civil rights organizations, which only rarely see eye to eye, joined in challenging the statute below; support the petition here; and individually and collectively recognize the fundamental need for review and clarification of the law by this Court. The important missing voice, however, is that of the Executive Branch of the United States, which has a critical interest in en-

suring the integrity and uniformity of immigration laws, in regulating the employment of aliens, and in ensuring that the Legislative Branch's intent is not thwarted. It is the Executive Branch that administers the federal status verification systems at issue here, as well as the exclusive system for adjudicating violations of federal immigration law into which Arizona now would intrude. The Court should invite the views of the Solicitor General on these important national issues, and then grant certiorari to resolve them.

STATEMENT OF THE CASE

This case centers on the interplay between federal immigration law and the Legal Arizona Workers Act, which seeks to regulate employment eligibility and immigration status verification. It therefore is necessary to briefly explain the federal and state statutes implicated here.

I. STATUTORY AND REGULATORY BACKGROUND

This Court long has recognized that most questions involving immigration are regulated exclusively by the federal government. *Hines* v. *Davidowitz*, 312 U.S. 52, 60-62 (1941). One exception used to be the employment of aliens. Prior to 1986, it could fairly be said that federal law (in the form of the then-controlling Immigration and Nationality Act, ch. 447, 66 Stat. 163 (1952)) had only "a peripheral concern with employment of illegal entrants." *De Canas* v. *Bica*, 424 U.S. 351, 360 (1976). After 15 years of study, however, Congress changed course when it enacted IRCA in 1986. That statute constituted a "comprehensive scheme prohibiting the employment of illegal aliens in the United States." *Hoffman*, 535 U.S. at 147.

IRCA makes it unlawful "to hire, or to recruit or refer for a fee, for employment in the United States an alien knowing the alien is an unauthorized alien." 8 U.S.C. § 1324a(a)(1)(A). Violations of the statute are adjudicated before a federal administrative law judge in accordance with procedures dictated in detailed and lengthy statutory and regulatory provisions. See generally *id.* § 1324a(e); 28 C.F.R. pt. 68. These provisions specify civil and criminal sanctions for employers that violate IRCA, including graduated monetary penalties, civil injunctions, criminal fines (of up to $3,000 per unauthorized worker), and even imprisonment (of up to six months). 8 U.S.C. § 1324a(e)(4), (f); 8 C.F.R. § 274a.10(a), (b)(1)(ii)(A). The administrative law judge's decision is subject to administrative appellate review, and then to federal judicial review. 8 U.S.C. § 1324a(e)(7), (8).

To ensure compliance with the statute, Congress established a system for employers to verify employees' work eligibility. See 8 U.S.C. § 1324a(b); 8 C.F.R. § 274a.2(b). This system, known as the I-9 Form process, requires employers to collect documents establishing the employee's work authorization and identity, and then to complete a form (the federal I-9 Employment Eligibility Form) for submission upon request to federal officials. 8 U.S.C. § 1324a(b); 8 C.F.R. § 274a.2(b). An employer who in good faith complies with this process cannot be sanctioned, even if the employee later is determined to lack employment eligibility. 8 U.S.C. § 1324a(a)(3).

For a decade, the I-9 Form process served as the exclusive means for employers to verify employees' work authorization status. See *Hoffman*, 535 U.S. at 147-48. In 1996, Congress additionally established three test "pilot programs" for employment status verification. Relevant here, these included the Basic

Pilot Program (since rebranded "E-Verify" by the Department of Homeland Security). E-Verify is a method of electronic verification that an employer may use in addition to the I-9 system. See IIRIRA §§ 401-405. Under E-Verify, an employer who enters into an agreement with the federal government is granted access to Internet databases maintained by the government. An employer then can check the information in those databases against information submitted by prospective hires, and determine (tentatively) whether the employee is authorized to work. *Id.*

E-Verify is massive in scope and error-prone. It imposes substantial transaction and opportunity costs on businesses, and it was feared to lead to unlawful discrimination on the basis of national origin. Accordingly, Congress expressly made the program voluntary. IIRIRA § 402. The government "*may not require* any person or other entity to participate" in the program, *id.* (emphasis added), subject only to enumerated exceptions for certain departments of the federal government and congressional offices, *id.* § 402(e).[4]

Federal law also makes clear the primacy of federal authority in regulating the employment of aliens. IRCA expressly preempts "any State or local law imposing civil or criminal sanctions (other than through licensing and similar laws) upon those who employ,

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[4] Federal regulation in this arena is evolving. A recently adopted federal regulation would make E-Verify mandatory for certain federal contractors and subcontractors. Federal Acquisition Regulation, 73 Fed. Reg. 67,651 (Nov. 14, 2008); *see Chamber of Commerce* v. *Chertoff*, No. 8:08-cv-3444 (D. Md. filed Dec. 23, 2008) (challenging the legality of the regulation). That regulation, however, does not broadly mandate the use of E-Verify, much less authorize states or localities to do so.

or recruit or refer for a fee for employment, unauthorized aliens." 8 U.S.C. § 1324a(h)(2). And, Congress made clear that changes to the system regulating the employment of aliens would come incrementally, in order to permit careful study, rather than as the result of shifting political winds. IRCA therefore requires the Executive Branch to provide Congress with advance warning before making significant modifications to employment verification requirements. Specifically, the President must transmit to Congress detailed written reports of any proposed changes before those changes become effective, in some cases up to two years in advance. *Id.* § 1324a(d).

The notice requirement is not intended merely to put a leash on the Executive Branch. Rather, the deliberate process chosen by Congress reaffirms the careful fashion in which IRCA and IIRIRA balance between and among multiple considerations: deterring illegal immigration; preventing unauthorized employment; limiting burdens on employers; and recognizing the civil rights and interests of individuals seeking employment, as well as current employees. Congress calibrated that balance and dictated that the Executive Branch not recalibrate it without providing Congress ample notice and an opportunity to respond. 8 U.S.C. § 1324a(d). It is against this legislative and regulatory backdrop that states and localities have attempted to impose their own, different judgments about how to deal with the employment of aliens in the United States.

II. THE ARIZONA STATUTE

In 2007, Arizona enacted the Legal Arizona Workers Act. Its express purpose was to take on the role of immigration enforcement that was occupied by the federal government. In signing the legislation, then-Governor Janet Napolitano (now the Secretary of the

Department of Homeland Security) acknowledged that "[i]mmigration is a federal responsibility," but asserted that state regulation was necessary because, in her view, "Congress [is] incapable of coping with the comprehensive immigration reforms of our country's needs." Pls./Appellant's Excerpts of Rec. 287, No. 07-17272 (9th Cir. filed Mar. 31, 2008) ("ER").

The Act contradicts federal immigration policy in at least two important ways. *First*, it establishes an independent state prohibition on the hiring of unauthorized aliens, see Ariz. Rev. Stat. § 23-212(A), and imposes additional sanctions on employers who are found by a *state* judge to have violated that prohibition, *id.* § 23-212(F). These sanctions include the revocation or suspension of a company's "licenses," defined broadly to include articles of incorporation and other such foundational company documents. *Id.* §§ 23-211, 23-212. In short, a company found to have violated the new state immigration law could have its charter revoked and its very existence extinguished by the state. See *id.* Governor Napolitano accurately christened this draconian provision the "business death penalty." ER, *supra*, at 291.

Second, the Arizona statute makes the voluntary E-Verify program mandatory for all Arizona employers. Ariz. Rev. Stat. § 23-214. It no longer suffices for employers in Arizona to employ the document-based I-9 Form process established by, and acceptable under, federal law. See 8 U.S.C. § 1324a(a)(1), (a)(3), (b). An Arizona employer that fails to participate in E-Verify may be denied economic development benefits, and forced to repay any benefits previously obtained from the state. Ariz. Rev. Stat. § 23-214.

III. PROCEDURAL BACKGROUND

A broad coalition of groups challenged the constitutionality of the Act soon after its passage. See Pet. App. 6a, 12a, 107a-09a. They alleged, among other things, that the Act was expressly and impliedly preempted by IRCA. *Id.* Named as defendants were Governor Napolitano, the Arizona Attorney General, Arizona county attorneys, and other state officials responsible for enforcing the Act. *Id.* The multiple similar lawsuits later were consolidated for decision. *Id.*

The district court held that the Act was not preempted. With respect to express preemption, it acknowledged that the penalties imposed by the Act qualify as "sanctions" within the meaning of IRCA's preemption provision. Pet. App. 61a-76a. It concluded, however, that the Act constituted a "licensing [or] similar law[]," and so fell within the preemption provision's savings clause. *Id.* The court further held that the Act's provisions concerning E-Verify were not impliedly preempted. *Id.* at 82a-85a. Although it recognized that Congress had made E-Verify voluntary, it found no preemption because Congress had not explicitly precluded states from making the program mandatory.

The Ninth Circuit affirmed. It agreed that, because Arizona had defined the sanctions imposed by the Act as "licensing" penalties, the statute fell within the savings clause of IRCA's preemption provision. Pet. App. 14a-19a. It also agreed that, because Congress "could have, but did not, expressly forbid state laws from requiring E-Verify participation," the sections of the Act mandating use of E-Verify were not preempted. *Id.* at 20a.

Both the district court and the Ninth Circuit viewed themselves as largely bound by this Court's 1976 decision in *De Canas* v. *Bica*. See Pet. App. 15a-16a, 69a-70a. That case, decided a decade before IRCA's enactment, held that a state statute regulating the employment of unauthorized workers was not preempted because the federal immigration laws in effect at the time did not address employment. The Ninth Circuit acknowledged that this Court recognized in 2002 that IRCA had dramatically changed the legal landscape—specifically, that IRCA "forcefully made combating the employment of illegal aliens central to the policy of immigration law." *Hoffman*, 535 U.S. at 147 (alteration and internal quotation marks omitted); see Pet. App. 15a-16a. Nevertheless, the court of appeals summarily dismissed this Court's clear statement of IRCA's importance, on the basis that *Hoffman* "did not concern state law or the issue of preemption." Pet. App. 16a.

REASONS FOR GRANTING THE PETITION

The growing discord between national immigration policy enacted by the federal government, and the shadow immigration policy being enacted by states and localities, is an issue of great national importance. So too are the specific issues presented here; the decision below implicates the status verification process that every single employer is required to undertake for every single new hire. This affects not just each prospective employee in the nine states within the Ninth Circuit, but every employer doing business in the dozens of states that have legislated on the subjects of alien hiring and immigration status verification. See generally *Bonito Boats, Inc.* v. *Thunder Craft Boats, Inc.*, 489 U.S. 141, 161 (1989) (considering the "prospect" of action by "all 50 States" in evaluating preemption); *Buckman Co.* v. *Plaintiffs'*

Legal Comm., 531 U.S. 341, 350 (2001) (same). This is an area in which Congress has declared that uniformity is essential, see generally *Zadvydas* v. *Davis*, 533 U.S. 678, 700 (2001) (recognizing the "Nation's need to 'speak with one voice' in immigration matters"), and the current state of affairs is intolerable for workers and employers alike. This burgeoning uncertainty is only exacerbated by the absence thus far of the United States' views on this debate. Cf. *Geier* v. *Am. Honda Motor Co.*, 529 U.S. 861, 881 (2000) (considering federal agency's views).

The decision below was able to approve of this result only by departing from this Court's decision in *Hoffman* and badly misreading federal law. To bring uniformity and clarity to rules that fundamentally affect primary conduct of an enormous number of people, to clarify the meaning and scope of *Hoffman*, and to resolve any possible tension between *Hoffman* and *De Canas*, the views of the Solicitor General should be sought and the petition should be granted.

I. REVIEW IS WARRANTED BECAUSE THIS CASE PRESENTS A QUESTION OF EXCEPTIONAL NATIONAL IMPORTANCE.

1. Congress crafted a national immigration policy that is, and expressly is intended to be, "comprehensive" and "uniform[]." *Hoffman*, 535 U.S. at 147; IRCA § 115, 100 Stat. at 3384. IRCA generally, and the employment status verification system in particular, affect every employer and every employee in the country. In creating this national system, Congress balanced multiple competing considerations implicated by the employment of aliens. So, for instance, Congress intended IRCA to deter illegal immigration, but not at all costs; it also sought a system that was "the least disruptive to the American businessman," and to "minimize the possibility of employment dis-

crimination." H.R. Rep. No. 99-682, pt. 1, at 56 (1986); S. Rep. No. 99-132, at 8-9 (1985); see *Collins Foods Int'l, Inc.*, v. *INS*, 948 F.2d 549, 554 (9th Cir. 1991) ("the legislative history of section 1324a indicates that Congress intended to minimize the burden and the risk placed on the employer in the verification process").

The I-9 Form process, which was the "keystone and major element" of this statute, reflected these goals. Statement of the President, Nov. 10, 1986, *reprinted in* 1986 U.S.C.C.A.N. 5856-1; see *Hoffman*, 535 U.S. at 147-48. Congress intended this system to be enforced "uniformly" throughout the United States, IRCA § 115, 100 Stat. at 3384, and this uniform system likewise is comprehensive. Federal law specifies who may work in this country, and who may not. See *supra* pp. 5-8. It details the obligations of employers, and of employees. See *supra* pp. 5-8. It prohibits certain conduct by employers and employees, provides a specialized federal system for adjudicating violations, and creates a substantial safe harbor for employers who "compl[y] in good faith" with the I-9 Form's requirements. See 8 U.S.C. §§ 1324a(a)(3), 1324c. The subsequent establishment of E-Verify and the other pilot programs took place against this backdrop. Congress established these programs on a limited and experimental basis so as not to fracture the nationally uniform system that it had created, and to forestall other adverse effects of E-Verify that it anticipated might arise. *See infra* p. 27.

Having crafted a national status verification system for employment that balanced multiple considerations, and having calibrated its chosen enforcement mechanisms, Congress took pains to preserve its authority in this field. IRCA expressly preempts "any State or local law imposing civil or criminal

sanctions (other than through licensing and similar laws) upon those who employ, or recruit or refer for a fee for employment, unauthorized aliens." 8 U.S.C. § 1324a(h)(2). That is, Congress enacted a broad preemption provision that contained only a limited exception for sanctions based on true licensing laws that require proper qualifications, and that rely on a federal finding of an IRCA violation.

2. The consistency sought by Congress is severely threatened by state legislatures and local governments across the country, which have enacted a "cacophony" of statutes that disrupt and seek to supplant federal immigration law. To permit this situation to persist is to sow confusion among employers and employees, as well as legislatures and town councils attempting to ascertain the proper zones of federal and local interest in the field of immigration.

The stream of state immigration legislation that began to flow a few years ago has become a flood. The National Conference of State Legislatures (NCSL) recently reported that 300 immigration bills were introduced in state legislatures in 2005, and 38 laws were enacted. NCSL, *2009 Immigration-Related Bills and Resolutions in the States*, *supra*. Those numbers doubled in 2006, when 570 bills were introduced and 84 laws enacted. *Id.* The numbers then tripled in 2007 and 2008, with more than 1,300 bills introduced and 200 laws enacted in each year. *Id.* And in the first three months of this year alone, legislatures across all 50 states introduced over 1,000 bills pertaining to immigration. *Id.* At least 150 of these bills (in 41 states) relate specifically to employment. *Id.*

These statutes have created a "patchwork of ... [different] laws, rules, and regulations," which is difficult for employers and employees to understand, and even

harder for them to follow. *Rowe* v. *N.H. Motor Transp. Ass'n*, 128 S. Ct. 989, 996 (2008); see *Hoffman*, 535 U.S. at 147-49. Some states have enacted laws similar to one another—relying, for instance, on model legislation proposed by the anti-immigration group IRLI.[5] Others have enacted slight variations, while still more have enacted directly contradictory rules. An area that is intended to be nationally uniform now requires national employers to engage in a 50-state compliance strategy, and local and regional employers to proceed town-by-town or county-by-county in making employment decisions. It also subjects employees to a labyrinth of differing and conflicting requirements for proof of work authorization, and exposes them to a much greater risk of unlawful harassment and discrimination, as DHS-sanctioned reports have found.[6]

Directly relevant here, this variability plagues state efforts to implement E-Verify. Some states, including Arizona and Mississippi, now require all employers to use E-Verify. See Ariz. Rev. Stat. § 23-214; Miss. Code Ann. § 71-11-3(3)(d), (4)(b)(i). In Colorado, Georgia, Minnesota, Missouri, and Rhode Island, as well as municipalities in Alabama, California, and Pennsylvania, E-Verify is required for businesses seeking public contracts.[7] Still other states require

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[5] *See* Immigration Reform Law Institute, *IRLI Model Taxpayer and Citizen Protection Act*, Part B, *available at* http://www.irli.org/tcpa_partb.html.

[6] Westat, *Findings of the Web Basic Pilot Evaluation* 77-79 (Sept. 2007) (hereafter "*Findings*"), *available at* http://www.uscis.gov/files/article/WebBasicPilotRprtSept2007.pdf.

[7] *See* Colo. Rev. Stat. § 8-17.5-102; Ga. Code Ann. § 13-10-91; Exec. Order No. 08-01 (Minn. Jan. 7, 2008); Mo. Rev. Stat. §§ 285-525, -530; Exec. Order No. 08-01 (R.I. Mar. 27, 2008); Albertville, Ala., Resolution No. 945-08 § 4; Mission Viejo, Cal.,

employers to use a state-created employment verification system, which may or may not be compatible with E-Verify. See, *e.g.*, Okla. Stat. tit. 25, §§ 1312, 1313(B)(2); Utah Code Ann. § 63G-11-103.[8] For its part, Illinois enacted a law that *forbade* employers from using E-Verify. 820 Ill. Comp. Stat. 55/12. The United States sued Illinois, and prevailed, on its argument that the Illinois statute was preempted by federal law. See *United States* v. *Illinois*, No. 07-3261, 2009 WL 662703 (C.D. Ill. Mar. 12, 2009).[9]

Ordinance No. 07-260 § 1; Hazleton, Pa., Ordinance No. 2006-18 § 4(D).

[8] The "Status Verification System" mandated in Oklahoma, for example, encompasses not only E-Verify, but also the "Social Security Number Verification Service" (even though it is impermissible to use the Social Security system for this purpose, *see* Social Sec. Admin., *Social Security Number Verification Service (SSNVS) Handbook* (Dec. 2008)) and other "third party" verification systems (which do not yet exist and are not authorized by federal law). *See* Okla. Stat. tit. 25, §§ 1312, 1313(B)(2); *cf.* S.C. Code Ann. § 41-8-20 (requiring employers to verify the status of new employees either by using E-Verify or through state documentation). Louisiana and Tennessee restrict the number and types of documents employers can use to verify work authorization status, which arguably prohibits compliance with E-Verify. *See* Tenn. Code Ann. § 50-1-106; La. Rev. Stat. Ann. § 23:992.2.

[9] These requirements are enforced by a wide range of sanctions. In Arizona, as discussed above, violations are punishable by suspension or revocation of the employer's "licenses," which the state defines broadly to go well beyond the traditional definition of a "license" and include withdrawal of the company's charter. *See* Ariz. Rev. Stat. § 23-212. Similar penalties are available for violations in Mississippi, Missouri, South Carolina, Tennessee, and West Virginia, as well as in certain municipalities in Alabama, California, and Pennsylvania. *See* Miss. Code Ann. 71-11-3(7)(e); Mo. Rev. Stat. §§ 285-525, -530; S.C. Code Ann. § 41-8-50; Tenn. Code Ann. § 50-1-103(e); W. Va. Code § 21-1B-7; Albertville, Ala., Resolution No. 945-08 § 4; Apple Valley, Cal., Resolution No. 2006-82; Hazleton, Pa., Ordinance

These are just a few of the differing verification requirements that states and municipalities have imposed on employers in recent years, and still more statutes—with still different standards and penalties—are under consideration.

3. It is immensely burdensome, if not in some circumstances impossible, to comply with the different immigration regulations of all 50 states and even more individual localities. Actions that are required in some jurisdictions are prohibited in others, and variations on state-level requirements abound. And, employers always must further take into account federal immigration law, with its detailed—and supposedly "comprehensive" and "uniform[]"—requirements. See *Hoffman*, 535 U.S. at 147; IRCA § 115, 100 Stat. at 3384.

Employees also suffer. It is all but certain—particularly given the state of the economy and the numerous applicants for every job opportunity—that some employers, when confronted with this patchwork of conflicting state regulations and the severe sanctions for violations, will simply avoid hiring individuals who even appear to pose a risk of an immigration violation, based on their race, ethnicity, or national origin. See, *e.g.*, *Findings*, *supra*, at 78-79 (noting problems with employer response to E-Verify

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No. 2006-18 § 4(B). Other jurisdictions provide that employers found to have violated state immigration laws are subject to tort liability and civil damages. *See* Okla. Stat. tit. 25, § 1313(C); La. Rev. Stat. Ann. 23:994; Miss. Code Ann. § 71-11-3(4)(d); Hazleton, Pa., Ordinance No. 2006-18 § 4(E). In Louisiana and West Virginia, authorities may also impose civil and criminal penalties (including fines or, in some cases, imprisonment) on employers they deem to have hired illegal aliens. La. Rev. Stat. Ann. § 23:993; W. Va. Code § 21-1B-5; *see also* Suffolk County, N.Y., Local Law No. 52-2006 § 8.

requirements). This approach will adversely impact racial and ethnic minority groups most heavily, but the burdens will extend to all persons, regardless of nationality or race. Congress itself recognized that permitting individual jurisdictions to institute different employee verification systems, many of them focused single-mindedly on the exclusion of illegal aliens, likely would lead to increased discrimination and fraud. See H.R. Rep. No. 99-682, pt. I, at 56; S. Rep. No. 99-132, at 8-9. Indeed, several measures in IRCA were designed to prevent this result, which is now threatened by state legislative efforts. See 8 U.S.C. § 1324b(a) (prohibiting several practices, including "request[ing] ... more or different documents" than § 1324a requires, which might mask discrimination).

The range of individuals and interests adversely affected by these laws is reflected in the extraordinary coalition that has joined arms in opposition to the Arizona statute. Business and community based associations, labor groups, and civil rights organizations all have submitted briefs challenging the Arizona statute and others like it. The simple fact that these parties readily join together on this issue testifies to its exceptional importance and the urgent need for this Court's review.

4. Nothing will be gained, and much will be lost, by allowing these problems to fester. For every month that passes without clarification of the law, state legislatures and county and municipal governments will continue to enact more immigration statutes that intrude upon the federal domain. NCSL, *2009 Immigration-Related Bills and Resolutions in the States*, *supra* (noting the "record numbers of bills and resolutions" recently introduced). Additional challenges will be filed, to be followed by years of

costly litigation. Only if state and local legislators receive guidance now can they be induced to hold or modify their legislative efforts, and can the limited resources of litigants and lower courts be saved.

Only this Court can provide the clarity and uniformity that the problem of hiring unauthorized aliens requires. The preemption issues presented in this case have been vetted by lower courts, and already have resulted in a split of authority. The district court and Ninth Circuit in this case held that state employment verification statutes are neither expressly nor impliedly preempted by federal immigration law. Specifically, both courts gave a broad construction to the savings clause in IRCA's preemption provision, thereby as a practical matter eviscerating the preemption provision. Pet. App. 14a-19a, 61a-76a. A district court in Missouri, addressing a similar municipal ordinance, held likewise. See *Gray* v. *City of Valley Park*, No. 07-881, 2008 WL 294294 (E.D. Mo. Jan. 31, 2008), *aff'd on other grounds*, 567 F.3d 976 (8th Cir. 2009).

In contrast, district courts in Oklahoma and Pennsylvania have held that local immigration regulations of this sort conflict with the "comprehensive" federal immigration scheme, and therefore are preempted. *Lozano* v. *City of Hazleton*, 496 F. Supp. 2d 477 (M.D. Pa. 2007), *appeal docketed*, No. 07-3531 (3d Cir. Aug. 30, 2007); *Chamber of Commerce* v. *Henry*, No. 08-109, 2008 WL 2329164 (W.D. Okla. June 4, 2008), *appeals docketed*, Nos. 08-6127, 08-6128 (10th Cir. June 19, 2008). The Pennsylvania court explicitly rejected the broad interpretation of "licensing" adopted here by the Ninth Circuit, holding instead that a state statute falls within the savings clause only when it conditions a license or business permit on a

record of prior compliance with *federal* immigration law. *Lozano*, 496 F. Supp. 2d at 525.

Lower-court decisions, however, will do little to solve this national problem. An opinion by one court of appeals on the constitutionality of one statute, or even several, will not stop states and municipalities in other circuits from enforcing their own provisions, or enacting new ones. This Court is the only one that can address this issue definitively, and it should do so now. Delay will allow the pace of state and local immigration legislation to continue, and the concomitant damage to federal immigration policy. The collateral effects of this process, if permitted to go forward, will be felt by employers, employees, states and localities, and the lower courts for years to come. To bring some level of control and certainty to the process, this Court should grant the petition.

II. REVIEW IS WARRANTED BECAUSE THE DECISION BELOW CONFLICTS WITH THIS COURT'S PRECEDENT, AND MISINTERPRETS FEDERAL LAW.

Review is further warranted to correct the Ninth Circuit's disregard of this Court's decision in *Hoffman*, and its resulting misinterpretation of IRCA and IIRIRA.

1. This Court in *Hoffman* recognized that IRCA is a "comprehensive scheme" for regulating the employment of undocumented aliens and, further, that federal law "forcefully made combating the employment of illegal aliens central to the policy of immigration law." 535 U.S. at 147 (alteration and internal quotation marks omitted). *Hoffman* explained that IRCA occupies this field, and so precludes the enforcement of conflicting regulations—there, regulations administered by the National Labor Relations

Board. *Id.* at 145-49. Just as IRCA preempted the federal regulation at issue in *Hoffman*, it preempts the state statute at issue here.

The Ninth Circuit, however, held *Hoffman* irrelevant on the theory that *Hoffman* "did not involve preemption, or indeed any state regulation." Pet. App. 39a-40a. That reasoning simply ignores *Hoffman*'s fundamental holding. The question presented there, as here, was whether IRCA is sufficiently comprehensive to displace other employment-related regulation of immigration policy. 535 U.S. at 145-49. This Court held that it is. *Id.* That *Hoffman* addressed displacement of a federal regulation, rather than preemption of a state statute, is no justification for so lightly casting it aside.

The Ninth Circuit further reasoned that, because *Hoffman* is irrelevant, its preemption analysis instead must be governed by this Court's earlier decision in *De Canas*. Pet. App. 40a ("Because it did not concern state law or the issue of preemption, *Hoffman* did not affect the continuing vitality of *De Canas*."). To the extent there is any inconsistency between *De Canas* and *Hoffman*, any such conflict can be resolved only by this Court, a factor that additionally would justify this Court's review. In fact, however, *De Canas* interprets a statutory regime that no longer exists—for the reasons explained in *Hoffman*—and the Ninth Circuit's decision to rely on it anyway suggests a less than faithful reading of this Court's precedents.

De Canas held that a state statute regulating the employment of aliens was not preempted by federal immigration law. 424 U.S. at 355-56. That case, however, was decided in 1976, a decade before the passage of IRCA. See *id.* It interpreted the preemptive effect of a prior statutory scheme (the Immigra-

tion and Nationality Act), and concluded that *at that time* federal law evinced "at best ... a peripheral concern with employment of illegal entrants." *Id.* at 360. IRCA amended federal immigration law to fill precisely this gap, as *Hoffman* explained: Under IRCA, "the employment of illegal aliens [became] central to the policy of immigration law." *Hoffman*, 535 U.S. at 147 (alteration and internal quotation marks omitted).

Simply put, the Ninth Circuit relied on a 30-year-old decision interpreting the preemptive effect of a superseded federal law in order to ignore a seven-year-old decision of this Court that did take account of the major intervening changes in federal law. A faithful application of *Hoffman* would have recognized that IRCA created a comprehensive scheme concerning employment of aliens, and that it precludes inconsistent regulatory regimes. *Hoffman*, 535 U.S. at 147 The Arizona statute (and others like it) is just such a regime. It establishes independent standards and penalties that are not contemplated by federal law, and it mandates that state employers use an employment verification system that federal law explicitly states shall be voluntary. These state regulations, no less than the federal ones at issue in *Hoffman*, intrude into a field that Congress "forcefully" declared is addressed exclusively by federal immigration law. See *id.*

2. The Ninth Circuit's misunderstanding of *Hoffman* contributed to its misinterpretation of IRCA and IIRIRA. Those provisions, read correctly, clearly preempt the Arizona statute.

a. IRCA expressly preempts state and local laws that "impos[e] civil or criminal sanctions (other than through licensing and similar laws) upon those who employ, or recruit or refer for a fee for employment,

unauthorized aliens." 8 U.S.C. § 1324a(h)(2). The Ninth Circuit held that the Arizona statute—which imposes sanctions on employers that knowingly hire unauthorized aliens (as determined by a *state* judge)—is not preempted because the statute affects what the state calls "licenses," and therefore qualifies as a "licensing [or] similar law" within the savings clause of IRCA's preemption provision. Pet. App. 14a-19a.[10]

This conclusion seriously distorts the meaning of the phrase "licensing [or] similar law," and subverts congressional intent. A state statute is a "licensing [or] similar law" under IRCA only if it conditions the issuance or retention of a genuine license (or similar business permit) on a prior determination by *federal* authorities of noncompliance with *federal* immigration law. See 8 U.S.C. § 1324a(h)(2). Far from permitting state authorities to adjudicate an individual's federal immigration status, or whether he or she is work-authorized, IRCA provides for these determinations to be made by federal officials, in specialized administrative proceedings conducted under federal rules and regulations. See generally *id.* § 1324a(e); 28 C.F.R. pt. 68. It is only after such a predicate federal adjudication that a state may tack on additional "sanctions" through a "licensing [or] similar law," and so be preserved by IRCA's savings clause.[11]

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[10] There is no dispute that the Arizona Act, if it does not qualify as a "licensing [or] similar law" under the savings clause, is preempted by § 1324a(h)(2).

[11] *See Miss. Band of Choctaw Indians* v. *Holyfield*, 490 U.S. 30, 43 (1989) ("[I]n the absence of a plain indication to the contrary ... Congress when it enacts a statute is *not* making the application of the federal act dependent on state law.") (emphasis added; internal quotation marks omitted).

This interpretation of the savings clause is confirmed by its history and purpose. The savings clause was adopted to ensure that states could rely on federal determinations of compliance with federal immigration laws when issuing or considering business licenses or permits (in particular, for farm labor contractors). See H.R. Rep. No. 99-682, pt. I, at 58; see also 29 U.S.C. § 1813(a)(6) (permitting actions against the license of a farm labor contractor only after the individual "has been found to have violated [IRCA]"). It never was intended to allow states to judge for themselves the federal immigration or work authorization status of individuals. The committee report that accompanied IRCA affirms that the savings clause was intended merely to allow states to add on additional sanctions (in the form of the "suspension, revocation or refusal to reissue a license") for persons "who ha[ve] been found to have violated the sanctions provisions *in this legislation*." H.R. Rep. No. 99-682, pt. I, at 58 (emphasis added). Arizona's contrary rule flies in the face of IRCA's fundamental purposes of establishing a national and "uniform[]" verification system. IRCA § 115, 100 Stat. at 3384.

IRCA's broad preemption provision indicates that the savings clause was intended to mean "licensing" in the traditional sense—*i.e.*, as a genuine qualification to do business, such as a professional certification or permit. Arizona has taken this narrow exception to the preemption provision and allowed it to swallow the rule by defining licenses to include mere documentation requirements that enable an employer to do business, such as articles of incorporation. Congress could not have meant to allow states to circumvent IRCA's express limitation simply by requiring businesses to register a name or tax identification number and calling such documentation a "license."

Indeed, Arizona has exempted from the definition of "license" the very heart of what licensing has traditionally meant– professional licenses. Arizona Rev. Stat. § 23-211(9)(c)(ii).

This Court has repeatedly "declined to give broad effect to savings clauses where doing so would upset the careful regulatory scheme established by federal law." *Geier*, 529 U.S. at 870 (quoting *United States v. Locke*, 529 U.S. 89, 106-07 (2000) (alteration omitted)). That is exactly what the Ninth Circuit's interpretation of IRCA's savings clause would accomplish. It would authorize the creation of a parallel system of state and municipal employment verification and penalty provisions, backed by the bluntest of sanctions—the "business death penalty"—without any prior adjudication by the designated federal authorities. This is not what Congress intended.

b. The Ninth Circuit further erred in its conclusion that Arizona acted permissibly by making E-Verify mandatory. IIRIRA provides that the federal government "may not require any person or other entity to participate" in E-Verify. IIRIRA § 402(a). The Ninth Circuit concluded, however, that this provision expressly limits only the *federal* government, and so does not apply to state statutes like Arizona's. Pet. App. 20a. In short, it concluded that what DHS Secretary Napolitano now is expressly forbidden from doing as a federal official, she—and her fellow 49 governors—were free to do as state executives. Nothing in IIRIRA supports this counterintuitive result.

The text of IIRIRA repeatedly and expressly makes clear that E-Verify is, and must be administered as, a voluntary program. The voluntary nature of E-Verify is clear from the very title of the relevant statutory provision: "*Voluntary* Election to Participate in a Pilot Program." IIRIRA § 402 (emphasis added). The

statute gives employers the choice as to whether to participate: "[A]ny person or other entity that conducts any hiring ... may *elect* to participate in that pilot program." *Id.* § 402(a) (emphasis added); see also *id.* § 402(c)(2)(A) (a participating employer is an "electing person"). And, the Attorney General is required to "widely publicize ... the voluntary nature of the pilot programs." *Id.* § 402(d)(2); accord *id.* § 402(d)(3)(A). Everything about E-Verify is voluntary—with the exception of certain specified applications to the federal government, the enumeration of which demonstrates the otherwise blanket nature of the rule. See *id.* § 402; see also *O'Melveny & Myers* v. *FDIC*, 512 U.S. 79, 86 (1994) ("*Inclusio unius, exclusio alterius.*").

Congress made E-Verify voluntary for good reason: It is error-prone and requires participating employers to weigh possible benefits against serious burdens. A recent DHS-commissioned study of the program found that it misidentified the employment eligibility of naturalized citizens almost 10% of the time, and that foreign-born, work-authorized individuals were 30 times more likely to receive an erroneous tentative nonconfirmation than U.S.-born individuals. *Findings*, *supra*, at 97. These errors impose significant costs on employers. Under federal law, an employer is not permitted to rely on an initial, "tentative nonconfirmation" to take adverse action against the employee.[12] Instead, the employer must allow the employee to lodge a challenge, and then must wait until a federal agency has resolved the challenge, *id.*, which takes on average anywhere from 19 to 74 days, see *Findings*, *supra*, at 78-79. The burdens of this

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[12] *See* Pilot Programs for Employment Eligibility Confirmation, 62 Fed. Reg. 48,309, 48,312 (Sept. 15, 1997).

process are particularly acute for small businesses, which cannot afford significant delays in training and transitioning new employees. *Id.* at xxii-xxiii, 24. And, of course, employees who receive a "tentative nonconfirmation"—even if they later succeed in challenging that designation—can lose valuable training opportunities and may suffer harassment or other forms of discrimination. *Id.*

Congress considered these issues in enacting IIRIRA, and struck the delicate balance it deemed appropriate. It made the I-9 Form process (with a variety of document-based verification methods) mandatory, and created E-Verify as a voluntary and experimental system, which employers may choose to use—or not—in their discretion. See 8 U.S.C. § 1324a(b); 8 C.F.R. § 274a.2(b). Congress has repeatedly rejected proposals to make the E-Verify system mandatory for all employers. See, *e.g.*, H.R. 98, 110th Cong. § 5(a) (2007); H.R. 1951, 110th Cong. § 3 (2007). It is not for Arizona to disregard this judgment. See, *e.g.*, *Geier*, 529 U.S. at 881-82. Indeed, this Court has held that the Supremacy Clause prohibits a state from requiring the use of a single standard when Congress "deliberately sought variety" by approving "a mix of several different" options to reach its regulatory goal, as it did when it enacted IRCA and created the I-9 Form process. *See id.* at 878. Arizona's law stands in clear conflict with Congress's express decision to make E-Verify voluntary, and therefore is preempted. *See id.* at 881-82.

Because Arizona's law is typical of state and local laws throughout the United States that regulate employment of aliens, and which intrude into an area Congress plainly preempted, it is particularly appropriate for the Court to review the ruling of the court of appeals in this case. At a minimum, the Court

should solicit the views of the Executive Branch on the importance of the issue presented and the scope of Congress's preemptive intent.

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX

APPENDIX A

UNITED STATES COURT OF APPEALS,
NINTH CIRCUIT

Nos. 07-17272, 07-17274, 08-15357,
08-15359, 08-15360.
Argued and Submitted June 12, 2008.
Filed Sept. 17, 2008.
Amended March 9, 2009.

CHICANOS POR LA CAUSA, INC.; SOMOS AMERICA,
Plaintiffs-Appellants,

and

ARIZONA EMPLOYERS FOR IMMIGRATION REFORM INC.; CHAMBER OF COMMERCE OF THE UNITED STATES; ARIZONA CHAMBER OF COMMERCE; ARIZONA HISPANIC CHAMBER OF COMMERCE; ARIZONA FARM BUREAU FEDERATION; ARIZONA RESTAURANT AND HOSPITALITY ASSOCIATION; ASSOCIATED MINORITY CONTRACTORS OF AMERICA; ARIZONA ROOFING CONTRACTORS ASSOCIATION; NATIONAL ROOFING CONTRACTORS ASSOCIATION; WAKE UP ARIZONA! INC.; ARIZONA LANDSCAPE CONTRACTORS' ASSOCIATION; ARIZONA CONTRACTORS ASSOCIATION,
Plaintiffs,

v.

JANET NAPOLITANO; TERRY GODDARD; GALE GARRIOTT,
Defendants-Appellees.

CHICANOS POR LA CAUSA, INC.; SOMOS AMERICA,
Plaintiffs,

and

ARIZONA EMPLOYERS FOR IMMIGRATION REFORM INC.; CHAMBER OF COMMERCE OF THE UNITED STATES; ARIZONA CHAMBER OF COMMERCE; ARIZONA HISPANIC CHAMBER OF COMMERCE; ARIZONA FARM BUREAU FEDERATION; ARIZONA RESTAURANT AND HOSPITALITY ASSOCIATION; ASSOCIATED MINORITY CONTRACTORS OF AMERICA; ARIZONA ROOFING CONTRACTORS ASSOCIATION; NATIONAL ROOFING CONTRACTORS ASSOCIATION; WAKE UP ARIZONA! INC.; ARIZONA LANDSCAPE CONTRACTORS' ASSOCIATION; ARIZONA CONTRACTORS ASSOCIATION,

Plaintiffs-Appellants,

v.

JANET NAPOLITANO; TERRY GODDARD; GALE GARRIOTT,

Defendants-Appellees.

ARIZONA CONTRACTORS ASSOCIATION, INC.; ARIZONA EMPLOYERS FOR IMMIGRATION REFORM INC.; CHAMBER OF COMMERCE OF THE UNITED STATES; ARIZONA CHAMBER OF COMMERCE; ARIZONA HISPANIC CHAMBER OF COMMERCE INC.; ARIZONA FARM BUREAU FEDERATION; ARIZONA RESTAURANT AND HOSPITALITY ASSOCIATION; ASSOCIATED MINORITY CONTRACTORS OF AMERICA; ARIZONA ROOFING CONTRACTORS ASSOCIATION; NATIONAL ROOFING CONTRACTORS ASSOCIATION; ARIZONA LANDSCAPE CONTRACTORS' ASSOCIATION,

Plaintiffs-Appellants,

and

WAKE UP ARIZONA! INC.; VALLE DEL SOL INC.; CHICANOS POR LA CAUSA, INC.; SOMOS AMERICA,

Plaintiffs,

v.

CRISS CANDELARIA; ED RHEINHEIMER; TERRENCE HANER; DAISY FLORES; KENNY ANGLE; DEREK D. RAPIER; MARTIN BRANNAN; ANDREW P. THOMAS; MATTHEW J. SMITH; JAMES CURRIER; BARBARA LAWALL; JAMES P. WALSH; GEORGE SILVA; SHEILA POLK; JON SMITH; TERRY GODDARD; FIDELIS V. GARCIA; GALE GARRIOTT; MELVIN R. BOWERS JR.,
Defendants-Appellees.

ARIZONA CONTRACTORS ASSOCIATION, INC.; ARIZONA EMPLOYERS FOR IMMIGRATION REFORM INC.; CHAMBER OF COMMERCE OF THE UNITED STATES; ARIZONA CHAMBER OF COMMERCE; ARIZONA HISPANIC CHAMBER OF COMMERCE INC.; ARIZONA FARM BUREAU FEDERATION; ARIZONA RESTAURANT AND HOSPITALITY ASSOCIATION; ASSOCIATED MINORITY CONTRACTORS OF AMERICA; ARIZONA ROOFING CONTRACTORS ASSOCIATION; NATIONAL ROOFING CONTRACTORS ASSOCIATION; ARIZONA LANDSCAPE CONTRACTORS' ASSOCIATION,
Plaintiffs,

and

WAKE UP ARIZONA! INC.; VALLE DEL SOL INC.; CHICANOS POR LA CAUSA, INC.; SOMOS AMERICA,
Plaintiffs-Appellants,

v.

CRISS CANDELARIA; ED RHEINHEIMER; TERRENCE HANER; DAISY FLORES; KENNY ANGLE; DEREK D. RAPIER; MARTIN BRANNAN; ANDREW P. THOMAS; MATTHEW J. SMITH; JAMES CURRIER; BARBARA LAWALL; JAMES P. WALSH; GEORGE SILVA; SHEILA POLK; JON SMITH; TERRY GODDARD; FIDELIS V. GARCIA; GALE GARRIOTT; MELVIN R. BOWERS JR.,
Defendants-Appellees.

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Plaintiffs,

VALLE DEL SOL INC.; CHICANOS POR LA CAUSA, INC.; SOMOS AMERICA,

Plaintiffs,

and

WAKE UP ARIZONA! INC.,

Plaintiff-Appellant,

v.

CRISS CANDELARIA; ED RHEINHEIMER; TERRENCE HANER; DAISY FLORES; KENNY ANGLE; DEREK D. RAPIER; MARTIN BRANNAN; ANDREW P. THOMAS; MATTHEW J. SMITH; JAMES CURRIER; BARBARA LAWALL; JAMES P. WALSH; GEORGE SILVA; SHEILA POLK; JON SMITH; TERRY GODDARD; FIDELIS V. GARCIA; GALE GARRIOTT; MELVIN R. BOWERS JR.,

Defendant-Appellant.

Appeal from the United States District Court
for the District of Arizona,
Neil V. Wake, District Judge, Presiding.
D.C. Nos. CV-07-01355-NVW,
CV-07-02496-NVW, CV-07-02518-NVW.

ORDER AND AMENDED OPINION

ORDER

Before: MARY M. SCHROEDER, JOHN M. WALKER, JR.,* and N. RANDY SMITH, Circuit Judges.

The Opinion filed on September 17, 2008, and appearing at 544 F.3d 976, is amended as follows: on slip Opinion page 13076, lines 21-22, change heading "B." to read:

> *B. The Act's provisions mandating the use of E-Verify and creating potentially harsh sanctions are not impliedly preempted by federal law.*

The Opinion filed on September 17, 2008, and appearing at 544 F.3d 976, is further amended as follows: on slip Opinion page 13078, line 14, insert the following text:

> Plaintiffs also argue that the Act's potential sanctions of suspension or revocation of an employer's business license impliedly conflict with IRCA because the Act's sanctions are harsher than IRCA's monetary sanctions. Plaintiffs urge that the harsh sanctions, even though expressly saved from express preemption, have the effect of encouraging employers to discriminate, and that such an effect would conflict with IRCA's purposes. Their argument is essentially speculative, as no complaint has yet been filed under the Act and we have before us no record reflecting the Act's effect on employers. There is

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* The Honorable John M. Walker, Jr., Senior United States Circuit Judge for the Second Circuit, sitting by designation.

thus no adequate basis in this record for holding that the sanctions provisions create an implied conflict rendering the Act facially invalid. *See Crawford,* 128 S.Ct. at 1621-22.

With these amendments, the panel judges have voted to deny the petition for panel rehearing. Judges Schroeder and N.R. Smith have voted to deny the petition for rehearing en banc, and Judge Walker so recommends.

The full court has been advised of the petition for rehearing en banc and no judge has requested a vote on whether to rehear the matter en banc. Fed. R.App. P. 35.

The petition for rehearing and petition for rehearing en banc are DENIED. No further petitions for rehearing or rehearing en banc will be accepted.

OPINION

SCHROEDER, Circuit Judge:

This case is a facial challenge to an Arizona state law, enacted in 2007 and aimed at illegal immigration, that reflects rising frustration with the United States Congress's failure to enact comprehensive immigration reform. The Arizona law, called the Legal Arizona Workers Act, targets employers who hire illegal aliens, and its principal sanction is the revocation of state licenses to do business in Arizona. It has yet to be enforced against any employer.

Various business and civil-rights organizations (collectively, "plaintiffs") brought these actions against the fifteen county attorneys of the state of Arizona, the Governor of Arizona, the Arizona Attorney General, the Arizona Registrar of Contractors, and the Director of the Department of Revenue of

Arizona (collectively, "defendants"). Plaintiffs allege that the Legal Arizona Workers Act ("the Act"), Ariz.Rev.Stat. §§ 23-211 to 23-216, is expressly and impliedly preempted by the federal Immigration Reform and Control Act of 1986 ("IRCA"), 8 U.S.C. §§ 1324a-1324b, and the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 ("IIRIRA"), Pub.L. No. 104-208, 110 Stat. 3009 (1996), codified in various sections of 8 U.S.C. and 18 U.S.C. They also allege that the Act violates employers' rights to due process by denying them an opportunity to challenge the federal determination of the work-authorization status of their employees before sanctions are imposed.

The district court held that the law was not preempted. The main argument on appeal is that the law is expressly preempted by the federal immigration law provision preempting state regulation "other than through licensing and similar laws." 8 U.S.C. § 1324a(h)(2). The district court correctly determined that the Act was a "licensing" law within the meaning of the federal provision and therefore was not expressly preempted.

There is also a secondary, implied preemption issue that principally relates to the provision requiring employers to use the electronic verification system now being refined by the federal government as a tool to check the work-authorization status of employees through federal records. It is known as E-Verify. Under current federal immigration law, use of the system is voluntary, and the Arizona law makes it mandatory. We hold that such a requirement to use the federal verification tool, for which there is no substitute under development in either the state,

federal, or private sectors, is not expressly or impliedly preempted by federal policy.

Plaintiffs also contend that the statute does not guarantee employers an opportunity to be heard before their business licenses may be revoked. The statute can and should be reasonably interpreted to allow employers, before any license can be adversely affected, to present evidence to rebut the presumption that an employee is unauthorized.

We uphold the statute in all respects against this facial challenge, but we must observe that it is brought against a blank factual background of enforcement and outside the context of any particular case. If and when the statute is enforced, and the factual background is developed, other challenges to the Act as applied in any particular instance or manner will not be controlled by our decision. *See Crawford v. Marion County Election Bd.*,—U.S.—, 128 S.Ct. 1610, 1621, 170 L.Ed.2d 574 (2008) (describing heavy burden of persuasion to sustain a broad attack on the facial validity of a statute in all its applications).

Background

Sanctions for hiring unauthorized aliens were first created at the federal level when Congress passed IRCA in 1986. *See* Pub.L. No. 99-603, 100 Stat. 3359 (1986). IRCA prohibits knowingly or intentionally hiring or continuing to employ an unauthorized alien, 8 U.S.C. § 1324a(a), which it defines as an alien either not lawfully admitted for permanent residence or not authorized to be employed by IRCA or the U.S. Attorney General, 8 U.S.C. § 1324a(h)(3).

IRCA also sets out the method of demonstrating an employer's compliance with the law through a paper-

based method of verifying an employee's eligibility, known as the I-9 system. *Id.* § 1324a(b). It requires employees to attest to their eligibility to work and to present one of the specified identity documents. *Id.* § 1324a(b)(1), (2). IRCA then requires employers to examine the identity document the employee presents and attest that it appears to be genuine. *Id.* § 1324a(b)(1)(A). The employer is entitled to a defense to sanctions if the employer shows good-faith compliance with the I-9 system, unless the employer has engaged in a pattern or practice of violations. *Id.* § 1324a(b)(6).

The Attorney General is charged with enforcing violations of IRCA. *Id.* § 1324a(e). Hearings are held before selected administrative law judges ("ALJs"), and the ALJs' decisions are reviewable by the federal courts. *Id.* § 1324a(e)(3).

IRCA contains an express preemption provision, which states: "The provisions of this section preempt any State or local law imposing civil or criminal sanctions (other than through licensing and similar laws) upon those who employ, or recruit or refer for a fee for employment, unauthorized aliens." *Id.* § 1324a(h)(2). The scope of the savings clause, which permits state "licensing and similar laws," is a critical issue in this appeal.

IIRIRA directed the Attorney General to establish three pilot programs to ensure efficient and accurate verification of any new employee's eligibility for employment. Pub.L. No. 104-208, §§ 401-405, 110 Stat. 3009, 3009-655 to 3009-666. One of these programs, the Basic Pilot Program, was to be made available in at least five of the seven states with the highest estimated populations of aliens not lawfully present in the United States. *Id.* § 401(c), 110 Stat. at

3009-656. Congress amended IIRIRA in 2002 by extending the four-year period for the pilot programs to a six-year period, *see* Basic Pilot Extension Act of 2001, Pub.L. No. 107-128, § 2, 115 Stat. 2407, 2407 (2002), and again in 2003 by extending the six-year period to an eleven-year period, *see* Basic Pilot Program Extension and Expansion Act of 2003 ("Expansion Act"), Pub.L. No. 108-156, § 2, 117 Stat. 1944, 1944 (2003).

The Basic Pilot Program has thus been extended until November 2008. The Expansion Act also expanded the availability of the Basic Pilot Program to all fifty states. *See id.* § 3. The Basic Pilot Program, now known as E-Verify, is an internet-based system that allows an employer to verify an employee's work-authorization status. It is an alternative to the I-9 system. After an employer submits a verification request for an employee, E-Verify either issues a confirmation or a tentative nonconfirmation of work-authorization status. If a tentative nonconfirmation is issued, the employer must notify the employee, who has eight days to challenge the finding. The employer cannot take any adverse action against the employee during that time. If an employee does challenge the tentative nonconfirmation, the employer will be informed of the employee's final work-authorization status. Any employee who either does not challenge a tentative nonconfirmation or is unsuccessful in challenging a tentative nonconfirmation must be terminated, or the employer must notify the Department of Homeland Security ("DHS") that it will continue to employ that person. An employer who fails to notify DHS of the continued employment of a person who received a final nonconfirmation is subject to a civil money penalty. An employer who continues to employ a person after

receiving a final nonconfirmation is subject to a rebuttable presumption that it knowingly employed an unauthorized alien.

Against this federal backdrop, we turn to the state law at issue here. Arizona enacted the Legal Arizona Workers Act on July 2, 2007, with an effective date of January 1, 2008. 2007 Ariz. Sess. Laws Ch. 279. The Act allows the superior courts of Arizona to suspend or revoke the business licenses of employers who knowingly or intentionally hire unauthorized aliens. Ariz.Rev.Stat. § 23-212. Any person may submit a complaint to the Arizona Attorney General or a county attorney. *Id.* § 23-212(B). After determining a complaint is not false or frivolous, the appropriate county attorney is charged with bringing an action against the employer in superior court. *Id.* § 23-212(C), (D). The Act uses IRCA's definition of "unauthorized alien." *See id.* § 23-211(11). Additionally, the Act requires that the court use the federal government's determination of the employee's lawful status. *Id.* § 23-212(H).

The Act makes participation in E-Verify mandatory for all employers, although it provides no penalty for violation of the requirement. *See id.* § 23-214(A). The Act also includes an affirmative defense for good-faith compliance, explicitly incorporating IRCA. *See id.* § 23-212(J).

The Act mandates a graduated series of sanctions for violations. A first violation requires the employer to terminate the employment of all unauthorized aliens, file quarterly reports of all new hires for a probationary period, and file an affidavit stating that it terminated all unauthorized aliens and will not intentionally or knowingly hire any others. *Id.* §§ 23-212(F)-212.01(F). A second violation during the pro-

bationary period results in the permanent revocation of the employer's business license. *Id.* §§ 23-212(F)(2), (3), 23-212.01(F)(2), (3).

Plaintiffs originally filed an action challenging the Act on July 13, 2007, less than one month after the Act's enactment. The district court dismissed the first action for lack of subject matter jurisdiction because it did not name as defendants any of Arizona's county attorneys, who have the responsibility of enforcing the Act.

In December 2007, plaintiffs filed a second complaint, this time including the Arizona county attorneys as defendants. The principal contentions were that the Act was expressly preempted by federal law because the Act was not a "licensing" or "similar" law within the meaning of the savings clause of IRCA's preemption provision; that, even if the Act was not expressly preempted, it was impliedly preempted because its sanctions provisions and E-Verify requirement conflict with federal law; and that the Act violated employers' due process rights because it did not allow them an adequate opportunity to dispute the federal government's response that an employee was not authorized to work.

The matter proceeded to hearing, and the district court dismissed the Arizona Attorney General for lack of subject matter jurisdiction, because he lacks the authority to bring enforcement actions. The court ruled in favor of the remaining defendants on the merits. It held that the Act is not expressly preempted by IRCA because the Act is a licensing law within the meaning of the savings clause. It held that neither the Act's sanctions provisions, nor the provision mandating use of E-Verify, was inconsistent with federal policy, and thus they were not impliedly

preempted. Finally, the court held that the Act did not, on its face, violate due process because employers' due process rights were adequately protected. Plaintiffs now appeal.

Discussion

I. Preemption

Federal preemption can be either express or implied. *See Fid. Fed. Sav. & Loan Ass'n v. de la Cuesta,* 458 U.S. 141, 152-53, 102 S.Ct. 3014, 73 L.Ed.2d 664 (1982). When a federal statute contains an explicit preemption provision, we are to "'identify the domain expressly pre-empted' by that language." *Medtronic, Inc. v. Lohr,* 518 U.S. 470, 484, 116 S.Ct. 2240, 135 L.Ed.2d 700 (1996) (quoting *Cipollone v. Liggett Group, Inc.,* 505 U.S. 504, 517, 112 S.Ct. 2608, 120 L.Ed.2d 407 (1992)). IRCA contains an express preemption clause in its provision creating sanctions for hiring unauthorized aliens. It preempts all state sanctions "other than through licensing and similar laws." 8 U.S.C. § 1324a(h)(2). Plaintiffs contend that the Act is expressly preempted.

Implied preemption has two subcategories. *See Lorillard Tobacco Co. v. Reilly,* 533 U.S. 525, 541, 121 S.Ct. 2404, 150 L.Ed.2d 532 (2001). The first is field preemption, where "the depth and breadth of a congressional scheme . . . occupies the legislative field." *Id.* (citing *Fid. Fed. Sav.,* 458 U.S. at 153, 102 S.Ct. 3014). The second is conflict preemption, which occurs when either "'compliance with both federal and state regulations is a physical impossibility,'" *Fid. Fed. Sav.,* 458 U.S. at 152, 102 S.Ct. 3014 (quoting *Fla. Lime & Avocado Growers, Inc.,* 373 U.S. 132, 142-43, 83 S.Ct. 1210, 10 L.Ed.2d 248 (1963)), or where "state law stands as an obstacle to the accom-

plishment and execution of the full purposes and objectives of Congress," *id.* (internal quotation marks omitted) (quoting *Hines v. Davidowitz,* 312 U.S. 52, 67, 61 S.Ct. 399, 85 L.Ed. 581 (1941)). For conflict preemption to apply, the conflict must be an actual conflict, not merely a hypothetical or potential conflict. *See English v. Gen. Elec. Co.,* 496 U.S. 72, 89, 110 S.Ct. 2270, 110 L.Ed.2d 65 (1990). Plaintiffs contend that even if the entire Act is not expressly preempted, the mandatory requirement to use E-Verify is impliedly preempted because it conflicts with the voluntary program in IIRIRA.

A. The Act is not expressly preempted because it falls within IRCA's savings clause.

The explicit preemption provision in IRCA states: "The provisions of this section preempt any State or local law imposing civil or criminal sanctions (other than through licensing and similar laws) upon those who employ, or recruit or refer for a fee for employment, unauthorized aliens." 8 U.S.C. § 1324a(h)(2). The parties agree that the Act is expressly preempted by IRCA unless it falls within the savings clause of IRCA's express preemption provision. Plaintiffs argue that the Act does not fall within the savings clause because they contend the Act is not a "licensing law" within the ordinary meaning of the phrase, and that the savings clause was not intended to permit a state to create an adjudication and enforcement system independent of federal enforcement of IRCA violations.

The district court held that the plain language of section 1324a(h)(2) does not facially preempt the Act because it does no more than impose conditions on state licenses to do business and thus falls within the savings clause. *Ariz. Contractors Ass'n v. Candelaria,* 534 F.Supp.2d 1036, 1046-47 (D.Ariz.2008). The court

rejected plaintiffs' argument that section 1324a(h)(2) permits only licensing sanctions that are preceded by a federal adjudication of employer liability, reasoning that neither the plain language of section 1324a(h)(2) nor the legislative history supports plaintiffs' position. *Id.* at 1046-48.

The district court also rejected plaintiffs' argument that the savings clause should be interpreted narrowly, holding that because regulation in the employment field is traditionally an area of state concern, there is a presumption against preemption. *Id.* at 1050-52. An issue central to our preemption analysis is thus whether the subject matter of the state law is in an area of traditionally state or federal presence. When Congress legislates "in a field which the States have traditionally occupied . . . . we start with the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress." *United States v. Locke,* 529 U.S. 89, 108, 120 S.Ct. 1135, 146 L.Ed.2d 69 (2000) (internal quotation marks omitted) (quoting *Rice v. Santa Fe Elevator Corp.,* 331 U.S. 218, 230, 67 S.Ct. 1146, 91 L.Ed. 1447 (1947)). Conversely, we do not assume non-preemption "when the State regulates in an area where there has been a history of significant federal presence." *Id.*

A leading case involving the employment of illegal aliens is *De Canas v. Bica,* 424 U.S. 351, 96 S.Ct. 933, 47 L.Ed.2d 43 (1976). The Supreme Court there upheld a state law prohibiting the employment of unauthorized aliens against a preemption challenge because it concluded that the authority to regulate the employment of unauthorized workers is "within the mainstream" of the state's police powers. *Id.* at

356, 365, 96 S.Ct. 933. The Court reasoned that "the fact that aliens are the subject of a state statute does not render it a regulation of immigration, which is essentially a determination of who should or should not be admitted into the country, and the conditions under which a legal entrant may remain." *Id.* at 355, 96 S.Ct. 933.

Plaintiffs argue that reliance on *De Canas* is now misplaced because IRCA, passed after *De Canas,* brought the regulation of unauthorized employees within the scope of federal immigration law. They rely on language in a later case where the Court said that IRCA made the employment of unauthorized workers "central to '[t]he policy of immigration law.'" *Hoffman Plastic Compounds, Inc. v. NLRB,* 535 U.S. 137, 147, 122 S.Ct. 1275, 152 L.Ed.2d 271 (2002) (quoting *INS v. Nat'l Ctr. for Immigrants' Rights, Inc.,* 502 U.S. 183, 194 & n. 8, 112 S.Ct. 551, 116 L.Ed.2d 546 (1991)) (alteration in original). That case, however, did not involve preemption, or indeed any state regulation. It considered whether the National Labor Relations Board ("NLRB") could award backpay to an unauthorized worker, and the Court held it could not. The Court said that the NLRB had impermissibly "trench[ed] upon federal statutes and policies unrelated to the [National Labor Relations Act]" by awarding backpay to an unauthorized alien worker who was improperly terminated from his employment for participating in union-related activities. *Id.* at 140, 141, 144, 122 S.Ct. 1275. Because it did not concern state law or the issue of preemption, *Hoffman* did not affect the continuing vitality of *De Canas.* We conclude that, because the power to regulate the employment of unauthorized aliens remains within the states' historic police powers, an assumption of non-preemption applies here.

Plaintiffs contend that the term "license" was intended to encompass only licenses to engage in specific professions, such as medicine or law, and not licenses to conduct business. There is no support for such an interpretation. "Licensing" generally refers to "[a] governmental body's process of issuing a license," *Black's Law Dictionary* 940 (8th ed.2004), and a "license" is "a permission, usually revocable, to commit some act that would otherwise be unlawful," *id.* at 938. The Act provides for the suspension of employers' licenses to do business in the state. *See* Ariz.Rev.Stat. § 23-212(F). Such licenses are defined as "any agency permit, certificate, approval, registration, charter or similar form of authorization that is required by law and that is issued by any agency for the purposes of operating a business in this state." *Id.* § 23-211(9)(a). The statute's broad definition of "license" is in line with the terms traditionally used and falls within the savings clause. The language of the savings clause therefore exempts such state licensing regulation from express preemption. A recent district court case that considered the same issue reached the same conclusion. *See Gray v. City of Valley Park,* No. 4:07CV00881 ERW, 2008 WL 294294, at **8, 10, 12 (E.D.Mo. Jan. 31, 2008) (holding that city ordinance governing issuance and denial of business permits fell within meaning of savings clause). *But see Lozano v. City of Hazleton,* 496 F.Supp.2d 477, 519-21 (M.D.Pa.2007) (concluding that state law prohibiting employment of illegal aliens was expressly preempted by IRCA).

Plaintiffs nevertheless contend that the legislative history demonstrates that Congress intended the savings clause to permit states to impose a state sanction only after there had been a federal determination of an alien's unauthorized status. Plaintiffs

rely on the second sentence in a paragraph from Part I of House Report 99-682, which as a whole states:

> The penalties contained in this legislation are intended to specifically preempt any state or local laws providing civil fines and/or criminal sanctions on the hiring, recruitment or referral of undocumented aliens. They are not intended to preempt or prevent lawful state or local processes concerning the suspension, revocation or refusal to reissue a license to any person who has been found to have violated the sanctions provisions in this legislation. Further, the Committee does not intend to preempt licensing or "fitness to do business laws," such as state farm labor contractor laws or forestry laws, which specifically require such licensee or contractor to refrain from hiring, recruiting or referring undocumented aliens.

H.R.Rep. No. 99-682(i), at 58 (1986) *as reprinted in* 1986 U.S.C.C.A.N. 5649, 5662. As the district court found, however, this paragraph as a whole does not support plaintiffs' argument. The paragraph describes the federal law as preempting "civil fines and/or criminal sanctions," neither of which the Act imposes. The paragraph does not suggest that the federal law would preempt local laws that suspend or revoke licenses on the basis of IRCA violations, or state licensing laws that require employers not to hire unauthorized workers. As the district court concluded, plaintiffs' reading of the second sentence, as permitting enforcement only of state licensing regulations conditioned on federally adjudicated violations, is contradicted by the third sentence, which recognizes states can condition an employer's "fitness to do business" on hiring documented workers. That is what the Arizona Act does.

In sum, the Act does not attempt to define who is eligible or ineligible to work under our immigration laws. It is premised on enforcement of federal standards as embodied in federal immigration law. The district court therefore correctly held that the Act is a "licensing" measure that falls within the savings clause of IRCA's preemption provision.

Plaintiffs finally contend that this kind of state regulation must be preempted because there is a potential for conflict in the practical operation of the state and federal law. They point to a hypothetical situation in which an employer may be subject to conflicting rulings from state and federal tribunals on the basis of the same hiring situation. Whether principles of comity or issue preclusion would allow such a result are questions not addressed by the parties. In any event, a speculative, hypothetical possibility does not provide an adequate basis to sustain a facial challenge. *See Crawford,* 128 S.Ct. at 1621.

B. The Act's provisions mandating the use of E-Verify and creating potentially harsh sanctions are not impliedly preempted by federal law.

Plaintiffs argue that the Arizona provision mandating the use of E-Verify is impliedly preempted because it conflicts with Congressional intent to keep the use voluntary. They contend that Congress wanted to develop a reliable and non-burdensome system of work-authorization verification, and that mandatory use of E-Verify impedes that purpose. They rely on the Supreme Court's decision in *Geier v. Am. Honda Motor Co.,* 529 U.S. 861, 120 S.Ct. 1913, 146 L.Ed.2d 914 (2000). *Geier* recognized that state laws that fall within a savings clause and are therefore not expressly preempted are still subject to the "ordinary working of conflict pre-emption principles."

Id. at 869, 120 S.Ct. 1913. A state law is preempted through conflict preemption when it "'stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.'" *Id.* at 873, 120 S.Ct. 1913 (quoting *Hines,* 312 U.S. at 67, 61 S.Ct. 399). *Geier* involved a Department of Transportation regulation that was designed to encourage competition among automobile manufacturers to design effective and convenient passive-restraint systems. The regulation required only 10% of a car manufacturer's production to include airbags. The Court in *Geier* held that state tort law, permitting liability to be imposed for failure to provide airbags, conflicted with the federal policy to encourage development of different restraint systems. *Id.* at 886, 120 S.Ct. 1913.

The district court here held that Arizona's requirement that employers use E-Verify was not preempted because, while Congress made participation in E-Verify voluntary at the national level, that did not in and of itself indicate that Congress intended to prevent states from making participation mandatory. *Ariz. Contractors,* 534 F.Supp.2d at 1055-56. We agree with that holding. Congress could have, but did not, expressly forbid state laws from requiring E-Verify participation. It certainly knew how to do so because, at the same time, it did expressly forbid "any State or local law imposing civil or criminal sanctions (other than through licensing and similar laws) upon those who employ, or recruit or refer for a fee for employment, unauthorized aliens." 8 U.S.C. § 1324a(h)(2).

Furthermore, this case is unlike *Geier,* where the Supreme Court found strong evidence of Congress's intent to promote competition and balance federal

goals in a competitive environment encouraging alternative systems. Here, E-Verify is a federal government service that Congress has implicitly strongly encouraged by expanding its duration and its availability (to all fifty states). *See* Basic Pilot Program Extension and Expansion Act of 2003, Pub.L. No. 108-156, 117 Stat.1944, 1944; Basic Pilot Extension Act of 2001, Pub.L. No. 107-128, sec. 2, 115 Stat. 2407, 2407. Though Congress did not mandate E-Verify, Congress plainly envisioned and endorsed an increase in its usage. The Act's requirement that employers participate in E-Verify is consistent with and furthers this purpose, and thus does not raise conflict preemption concerns.

Appellants contend that conflict preemption is a concern here also because of the Act's potentially discriminatory effects. Their argument is that E-Verify increases discrimination against workers who look or sound "foreign," and that mandatory E-Verify usage thus upsets the enforcement/discrimination balance that Congress has maintained by keeping E-Verify optional. This argument fails because Congress requires employers to use either E-Verify or I-9, and appellants have not shown that E-Verify results in any greater discrimination than I-9.

Plaintiffs also argue that the Act's potential sanctions of suspension or revocation of an employer's business license impliedly conflict with IRCA because the Act's sanctions are harsher than IRCA's monetary sanctions. Plaintiffs urge that the harsh sanctions, even though expressly saved from express preemption, have the effect of encouraging employers to discriminate, and that such an effect would conflict with IRCA's purposes. Their argument is essentially speculative, as no complaint has yet been filed under

the Act and we have before us no record reflecting the Act's effect on employers. There is thus no adequate basis in this record for holding that the sanctions provisions create an implied conflict rendering the Act facially invalid. *See Crawford,* 128 S.Ct. at 1621-22.

II. Due Process

The deprivation of a property interest must "'be preceded by notice and opportunity for hearing appropriate to the nature of the case.'" *Cleveland Bd. of Educ. v. Loudermill,* 470 U.S. 532, 542, 105 S.Ct. 1487, 84 L.Ed.2d 494 (1985) (quoting *Mullane v. Cent. Hanover Bank & Trust Co.,* 339 U.S. 306, 313, 70 S.Ct. 652, 94 L.Ed. 865 (1950)). An Arizona business license is a property interest. *See, e.g., Comeau v. Ariz. State Bd. of Dental Exam'rs,* 196 Ariz. 102, 993 P.2d 1066, 1070 (1999). An opportunity to be heard must be "'at a meaningful time and in a meaningful manner.'" *Mathews v. Eldridge,* 424 U.S. 319, 333, 96 S.Ct. 893, 47 L.Ed.2d 18 (1976) (quoting *Armstrong v. Manzo,* 380 U.S. 545, 552, 85 S.Ct. 1187, 14 L.Ed.2d 62 (1965)). Employers thus should be given an opportunity to be heard before their business licenses are suspended or revoked under the Act.

The Act sets forth the procedures to be followed in bringing an enforcement action. Any person may submit a complaint about a suspected violation to either the Arizona Attorney General or a county attorney. Ariz.Rev.Stat. § 23-212(B). The Attorney General or county attorney investigating a complaint must verify the alleged unauthorized alien's work-authorization status with the federal government pursuant to 8 U.S.C. § 1373; the state official is prohibited from attempting to make an independent determination of the alien's status. *Id.* After a com-

plaint is investigated and found not to be false or frivolous, a county attorney must bring an enforcement action against the employer in state court in the county in which the alien was employed. *Id.* § 23-212(C), (D). The court is to expedite the action, which includes scheduling the hearing as quickly as is practicable. *Id.* § 23-212(E).

Subsection (H) of section 212 describes the state court's procedures to obtain information from the federal government on whether an alien was unauthorized to work:

> On [sic] determining whether an employee is an unauthorized alien, the court shall consider only the federal government's determination pursuant to 8 United States Code § 1373(c). The federal government's determination creates a rebuttable presumption of the employee's lawful status. The court may take judicial notice of the federal government's determination and may request the federal government to provide automated or testimonial verification pursuant to 8 United States Code § 1373(c).

Id. § 23-212(H). Section 1373(c) of title 8 of the U.S.Code provides that the Immigration and Naturalization Service "shall respond to an inquiry by a Federal, State, or local government agency, seeking to verify or ascertain the citizenship or immigration status of any individual within the jurisdiction of the agency for any purpose authorized by law, by providing the requested verification or status information." 8 U.S.C. § 1373(c).

Plaintiffs contend, in this facial challenge, that the Act violates due process because it deprives employers of their business licenses without providing them an adequate opportunity to dispute whether an

employee was authorized to work. Plaintiffs rely on the first sentence of subsection (H) to argue that the Act prohibits employers at the state-court hearing from presenting any evidence to rebut the federal government's § 1373 response on the issue of the employee's work status. Defendants, however, point to the second sentence of subsection (H), which provides that the federal response creates only a rebuttable presumption. They contend that the employer can rebut the federal response with other evidence during a hearing.

Plaintiffs' interpretation of subsection (H) is flawed because it gives no meaning to the second sentence of the provision. That sentence at least implicitly contemplates a hearing to rebut the presumption created by the federal determination of an employee's unauthorized status. *See* Ariz.Rev.Stat. § 23-212(H). Arizona law, consistent with ordinary principles of statutory interpretation, requires that "'[e]ach word, phrase, clause, and sentence [of a statute] must be given meaning so that no part will be void, inert, redundant, or trivial.'" *Williams v. Thude*, 188 Ariz. 257, 934 P.2d 1349, 1351 (1997) (second alteration in original) (emphasis omitted) (quoting *City of Phoenix v. Yates*, 69 Ariz. 68, 208 P.2d 1147, 1149 (1949)). We conclude that the statute provides an employer the opportunity, during the state court proceeding, to present rebuttal evidence.

Furthermore, defendants explain any apparent incongruity between the first two sentences of subsection (H) by pointing to parallel language found in an earlier subsection, subsection (B), which relates to the initial investigation of a complaint:

> When investigating a complaint, the attorney general or county attorney shall verify the work

> authorization of the alleged unauthorized alien with the federal government pursuant to 8 United States Code § 1373(c). A state, county or local official shall not attempt to independently make a final determination on whether an alien is authorized to work in the United States.

Ariz.Rev.Stat. § 23-212(B). Defendants explain that this section, like the first sentence of subsection (H), provides, somewhat inartfully, that the initial investigation and the basis for bringing an enforcement action must be limited to the federal response, thereby precluding independent state investigation. The employer would then have the opportunity to present evidence. The district court agreed. The district court persuasively reasoned that requiring the state or county to obtain a federal determination of an employee's work status before bringing proceedings may be intended to protect employees from direct investigation by the state.

We therefore conclude that the district court correctly determined that the Act provides sufficient process to survive this facial challenge. More importantly, the district court also found that the statute does not preclude the presentation of counterevidence when an employer's liability is at issue, *Ariz. Contractors,* 534 F.Supp.2d at 1058, and we agree with this interpretation. An employer's opportunity to present evidence at a hearing in superior court, in order to rebut the presumption of the employee's unauthorized status, provides the employer a meaningful opportunity to be heard before sanctions are imposed. We conclude that subsection (H) is facially constitutional.

The district court's judgment is AFFIRMED.

APPENDIX B

UNITED STATES COURT OF APPEALS,
NINTH CIRCUIT.

Nos. 07-17272, 07-17274, 08-15357,
08-15359, 08-15360.
Argued and Submitted June 12, 2008.
Filed Sept. 17, 2008.

CHICANOS POR LA CAUSA, INC.; SOMOS AMERICA,
Plaintiffs-Appellants,
and

ARIZONA EMPLOYERS FOR IMMIGRATION REFORM INC.; CHAMBER OF COMMERCE OF THE UNITED STATES; ARIZONA CHAMBER OF COMMERCE; ARIZONA HISPANIC CHAMBER OF COMMERCE; ARIZONA FARM BUREAU FEDERATION; ARIZONA RESTAURANT AND HOSPITALITY ASSOCIATION; ASSOCIATED MINORITY CONTRACTORS OF AMERICA; ARIZONA ROOFING CONTRACTORS ASSOCIATION; NATIONAL ROOFING CONTRACTORS ASSOCIATION; WAKE UP ARIZONA! INC.; ARIZONA LANDSCAPE CONTRACTORS' ASSOCIATION; ARIZONA CONTRACTORS ASSOCIATION,
Plaintiffs,

v.

JANET NAPOLITANO; TERRY GODDARD; GALE GARRIOTT,
Defendants-Appellees.

CHICANOS POR LA CAUSA, INC.; SOMOS AMERICA,
Plaintiffs,

and

ARIZONA EMPLOYERS FOR IMMIGRATION REFORM INC.; CHAMBER OF COMMERCE OF THE UNITED STATES;

ARIZONA CHAMBER OF COMMERCE; ARIZONA HISPANIC CHAMBER OF COMMERCE; ARIZONA FARM BUREAU FEDERATION; ARIZONA RESTAURANT AND HOSPITALITY ASSOCIATION; ASSOCIATED MINORITY CONTRACTORS OF AMERICA; ARIZONA ROOFING CONTRACTORS ASSOCIATION; NATIONAL ROOFING CONTRACTORS ASSOCIATION; WAKE UP ARIZONA! INC.; ARIZONA LANDSCAPE CONTRACTORS' ASSOCIATION; ARIZONA CONTRACTORS ASSOCIATION,

Plaintiffs-Appellants,

v.

JANET NAPOLITANO; TERRY GODDARD; GALE GARRIOTT,

Defendants-Appellees.

ARIZONA CONTRACTORS ASSOCIATION, INC.; ARIZONA EMPLOYERS FOR IMMIGRATION REFORM INC.; CHAMBER OF COMMERCE OF THE UNITED STATES; ARIZONA CHAMBER OF COMMERCE; ARIZONA HISPANIC CHAMBER OF COMMERCE INC.; ARIZONA FARM BUREAU FEDERATION; ARIZONA RESTAURANT AND HOSPITALITY ASSOCIATION; ASSOCIATED MINORITY CONTRACTORS OF AMERICA; ARIZONA ROOFING CONTRACTORS ASSOCIATION; NATIONAL ROOFING CONTRACTORS ASSOCIATION; ARIZONA LANDSCAPE CONTRACTORS' ASSOCIATION,

Plaintiffs-Appellants,

and

WAKE UP ARIZONA! INC.; VALLE DEL SOL INC.; CHICANOS POR LA CAUSA, INC.; SOMOS AMERICA,

Plaintiffs,

v.

CRISS CANDELARIA; ED RHEINHEIMER; TERRENCE HANER; DAISY FLORES; KENNY ANGLE; DEREK D. RAPIER; MARTIN BRANNAN; ANDREW P. THOMAS; MATTHEW J. SMITH; JAMES CURRIER; BARBARA

LAWALL; JAMES P. WALSH; GEORGE SILVA; SHEILA POLK; JON SMITH; TERRY GODDARD; FIDELIS V. GARCIA; GALE GARRIOTT; MELVIN R. BOWERS JR.,
Defendants-Appellees.

ARIZONA CONTRACTORS ASSOCIATION, INC.; ARIZONA EMPLOYERS FOR IMMIGRATION REFORM INC.; CHAMBER OF COMMERCE OF THE UNITED STATES; ARIZONA CHAMBER OF COMMERCE; ARIZONA HISPANIC CHAMBER OF COMMERCE INC.; ARIZONA FARM BUREAU FEDERATION; ARIZONA RESTAURANT AND HOSPITALITY ASSOCIATION; ASSOCIATED MINORITY CONTRACTORS OF AMERICA; ARIZONA ROOFING CONTRACTORS ASSOCIATION; NATIONAL ROOFING CONTRACTORS ASSOCIATION; ARIZONA LANDSCAPE CONTRACTORS' ASSOCIATION,
Plaintiffs,

and,

WAKE UP ARIZONA! INC.; VALLE DEL SOL INC.; CHICANOS POR LA CAUSA, INC.; SOMOS AMERICA,
Plaintiffs-Appellants,

v.

CRISS CANDELARIA; ED RHEINHEIMER; TERRENCE HANER; DAISY FLORES; KENNY ANGLE; DEREK D. RAPIER; MARTIN BRANNAN; ANDREW P. THOMAS; MATTHEW J. SMITH; JAMES CURRIER; BARBARA LAWALL; JAMES P. WALSH; GEORGE SILVA; SHEILA POLK; JON SMITH; TERRY GODDARD; FIDELIS V. GARCIA; GALE GARRIOTT; MELVIN R. BOWERS JR.,
Defendants-Appellees.

ARIZONA CONTRACTORS ASSOCIATION, INC.; ARIZONA EMPLOYERS FOR IMMIGRATION REFORM INC.;

CHAMBER OF COMMERCE OF THE UNITED STATES; ARIZONA CHAMBER OF COMMERCE; ARIZONA HISPANIC CHAMBER OF COMMERCE INC.; ARIZONA FARM BUREAU FEDERATION; ARIZONA RESTAURANT AND HOSPITALITY ASSOCIATION; ASSOCIATED MINORITY CONTRACTORS OF AMERICA; ARIZONA ROOFING CONTRACTORS ASSOCIATION; NATIONAL ROOFING CONTRACTORS ASSOCIATION; ARIZONA LANDSCAPE CONTRACTORS' ASSOCIATION,

Plaintiffs,

VALLE DEL SOL INC.; CHICANOS POR LA CAUSA, INC.; SOMOS AMERICA,

Plaintiffs

and

WAKE UP ARIZONA! INC.,

Plaintiff-Appellant,

v.

CRISS CANDELARIA; ED RHEINHEIMER; TERRENCE HANER; DAISY FLORES; KENNY ANGLE; DEREK D. RAPIER; MARTIN BRANNAN; ANDREW P. THOMAS; MATTHEW J. SMITH; JAMES CURRIER; BARBARA LAWALL; JAMES P. WALSH; GEORGE SILVA; SHEILA POLK; JON SMITH; TERRY GODDARD; FIDELIS V. GARCIA; GALE GARRIOTT; MELVIN R. BOWERS JR.,

Defendant-Appellant.

Appeal from the United States District Court
for the District of Arizona;
Neil V. Wake, District Judge, Presiding.
D.C. Nos. CV-07-01355-NVW,
CV-07-02496-NVW, CV-07-02518-NVW.

Before: MARY M. SCHROEDER, JOHN M. WALKER, JR.,* and N. RANDY SMITH, Circuit Judges.

OPINION

SCHROEDER, Circuit Judge:

This case is a facial challenge to an Arizona state law, enacted in 2007 and aimed at illegal immigration, that reflects rising frustration with the United States Congress's failure to enact comprehensive immigration reform. The Arizona law, called the Legal Arizona Workers Act, targets employers who hire illegal aliens, and its principal sanction is the revocation of state licenses to do business in Arizona. It has yet to be enforced against any employer.

Various business and civil-rights organizations (collectively, "plaintiffs") brought these actions against the fifteen county attorneys of the state of Arizona, the Governor of Arizona, the Arizona Attorney General, the Arizona Registrar of Contractors, and the Director of the Department of Revenue of Arizona (collectively, "defendants"). Plaintiffs allege that the Legal Arizona Workers Act ("the Act"), Ariz.Rev.Stat. §§ 23-211 to 23-216, is expressly and impliedly preempted by the federal Immigration Reform and Control Act of 1986 ("IRCA"), 8 U.S.C. §§ 1324a-1324b, and the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 ("IIRIRA"), Pub.L. No. 104-208, 110 Stat. 3009 (1996), codified in various sections of 8 U.S.C. and 18 U.S.C. They also allege that the Act violates employers' rights to due process by denying them an opportunity to challenge the federal determination of the work-authorization status of their employees before sanctions are imposed.

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* The Honorable John M. Walker, Jr., Senior United States Circuit Judge for the Second Circuit, sitting by designation.

The district court held that the law was not preempted. The main argument on appeal is that the law is expressly preempted by the federal immigration law provision preempting state regulation "other than through licensing and similar laws." 8 U.S.C. § 1324a(h)(2). The district court correctly determined that the Act was a "licensing" law within the meaning of the federal provision and therefore was not expressly preempted.

There is also a secondary, implied preemption issue that principally relates to the provision requiring employers to use the electronic verification system now being refined by the federal government as a tool to check the work-authorization status of employees through federal records. It is known as E-Verify. Under current federal immigration law, use of the system is voluntary, and the Arizona law makes it mandatory. We hold that such a requirement to use the federal verification tool, for which there is no substitute under development in either the state, federal, or private sectors, is not expressly or impliedly preempted by federal policy.

Plaintiffs also contend that the statute does not guarantee employers an opportunity to be heard before their business licenses may be revoked. The statute can and should be reasonably interpreted to allow employers, before any license can be adversely affected, to present evidence to rebut the presumption that an employee is unauthorized.

We uphold the statute in all respects against this facial challenge, but we must observe that it is brought against a blank factual background of enforcement and outside the context of any particular case. If and when the statute is enforced, and the factual background is developed, other challenges to the

Act as applied in any particular instance or manner will not be controlled by our decision. *See Crawford v. Marion County Election Bd.*,—U.S.—, 128 S.Ct. 1610, 1621, 170 L.Ed.2d 574 (2008) (describing heavy burden of persuasion to sustain a broad attack on the facial validity of a statute in all its applications).

Background

Sanctions for hiring unauthorized aliens were first created at the federal level when Congress passed IRCA in 1986. *See* Pub.L. No. 99-603, 100 Stat. 3359 (1986). IRCA prohibits knowingly or intentionally hiring or continuing to employ an unauthorized alien, 8 U.S.C. § 1324a(a), which it defines as an alien either not lawfully admitted for permanent residence or not authorized to be employed by IRCA or the U.S. Attorney General, 8 U.S.C. § 1324a(h)(3).

IRCA also sets out the method of demonstrating an employer's compliance with the law through a paper-based method of verifying an employee's eligibility, known as the I-9 system. *Id.* § 1324a(b). It requires employees to attest to their eligibility to work and to present one of the specified identity documents. *Id.* § 1324a(b)(1), (2). IRCA then requires employers to examine the identity document the employee presents and attest that it appears to be genuine. *Id.* § 1324a(b)(1)(A). The employer is entitled to a defense to sanctions if the employer shows good-faith compliance with the I-9 system, unless the employer has engaged in a pattern or practice of violations. *Id.* § 1324a(b)(6).

The Attorney General is charged with enforcing violations of IRCA. *Id.* § 1324a(e). Hearings are held before selected administrative law judges ("ALJs"), and the ALJs' decisions are reviewable by the federal courts. *Id.* § 1324a(e)(3).

IRCA contains an express preemption provision, which states: "The provisions of this section preempt any State or local law imposing civil or criminal sanctions (other than through licensing and similar laws) upon those who employ, or recruit or refer for a fee for employment, unauthorized aliens." *Id.* § 1324a(h)(2). The scope of the savings clause, which permits state "licensing and similar laws," is a critical issue in this appeal.

IIRIRA directed the Attorney General to establish three pilot programs to ensure efficient and accurate verification of any new employee's eligibility for employment. Pub.L. No. 104-208, §§ 401-405, 110 Stat. 3009, 3009-655 to 3009-666. One of these programs, the Basic Pilot Program, was to be made available in at least five of the seven states with the highest estimated populations of aliens not lawfully present in the United States. *Id.* § 401(c), 110 Stat. at 3009-656. Congress amended IIRIRA in 2002 by extending the four-year period for the pilot programs to a six-year period, *see* Basic Pilot Extension Act of 2001, Pub.L. No. 107-128, § 2, 115 Stat. 2407, 2407 (2002), and again in 2003 by extending the six-year period to an eleven-year period, *see* Basic Pilot Program Extension and Expansion Act of 2003 ("Expansion Act"), Pub.L. No. 108-156, § 2, 117 Stat.1944, 1944 (2003). The Basic Pilot Program has thus been extended until November 2008. The Expansion Act also expanded the availability of the Basic Pilot Program to all fifty states. *See id.* § 3.

The Basic Pilot Program, now known as E-Verify, is an internet-based system that allows an employer to verify an employee's work-authorization status. It is an alternative to the I-9 system. After an employer submits a verification request for an employee, E-

Verify either issues a confirmation or a tentative nonconfirmation of work-authorization status. If a tentative nonconfirmation is issued, the employer must notify the employee, who has eight days to challenge the finding. The employer cannot take any adverse action against the employee during that time. If an employee does challenge the tentative nonconfirmation, the employer will be informed of the employee's final work-authorization status. Any employee who either does not challenge a tentative nonconfirmation or is unsuccessful in challenging a tentative nonconfirmation must be terminated, or the employer must notify the Department of Homeland Security ("DHS") that it will continue to employ that person. An employer who fails to notify DHS of the continued employment of a person who received a final nonconfirmation is subject to a civil money penalty. An employer who continues to employ a person after receiving a final nonconfirmation is subject to a rebuttable presumption that it knowingly employed an unauthorized alien.

Against this federal backdrop, we turn to the state law at issue here. Arizona enacted the Legal Arizona Workers Act on July 2, 2007, with an effective date of January 1, 2008. 2007 Ariz. Sess. Laws Ch. 279. The Act allows the superior courts of Arizona to suspend or revoke the business licenses of employers who knowingly or intentionally hire unauthorized aliens. Ariz.Rev.Stat. § 23-212. Any person may submit a complaint to the Arizona Attorney General or a county attorney. *Id.* § 23-212(B). After determining a complaint is not false or frivolous, the appropriate county attorney is charged with bringing an action against the employer in superior court. *Id.* § 23-212(C), (D). The Act uses IRCA's definition of "unauthorized alien." *See id.* § 23-211(11). Additionally, the

Act requires that the court use the federal government's determination of the employee's lawful status. *Id.* § 23-212(H).

The Act makes participation in E-Verify mandatory for all employers, although it provides no penalty for violation of the requirement. *See id.* § 23-214(A). The Act also includes an affirmative defense for good-faith compliance, explicitly incorporating IRCA. *See id.* § 23-212(J).

The Act mandates a graduated series of sanctions for violations. A first violation requires the employer to terminate the employment of all unauthorized aliens, file quarterly reports of all new hires for a probationary period, and file an affidavit stating that it terminated all unauthorized aliens and will not intentionally or knowingly hire any others. *Id.* §§ 23-212(F)-212.01(F). A second violation during the probationary period results in the permanent revocation of the employer's business license. *Id.* §§ 23-212(F)(2), (3), 23-212.01(F)(2), (3).

Plaintiffs originally filed an action challenging the Act on July 13, 2007, less than one month after the Act's enactment. The district court dismissed the first action for lack of subject matter jurisdiction because it did not name as defendants any of Arizona's county attorneys, who have the responsibility of enforcing the Act.

In December 2007, plaintiffs filed a second complaint, this time including the Arizona county attorneys as defendants. The principal contentions were that the Act was expressly preempted by federal law because the Act was not a "licensing" or "similar" law within the meaning of the savings clause of IRCA's preemption provision; that, even if the Act was not expressly preempted, it was impliedly preempted

because its sanctions provisions and E-Verify requirement conflict with federal law; and that the Act violated employers' due process rights because it did not allow them an adequate opportunity to dispute the federal government's response that an employee was not authorized to work.

The matter proceeded to hearing, and the district court dismissed the Arizona Attorney General for lack of subject matter jurisdiction, because he lacks the authority to bring enforcement actions. The court ruled in favor of the remaining defendants on the merits. It held that the Act is not expressly preempted by IRCA because the Act is a licensing law within the meaning of the savings clause. It held that neither the Act's sanctions provisions, nor the provision mandating use of E-Verify, was inconsistent with federal policy, and thus they were not impliedly preempted. Finally, the court held that the Act did not, on its face, violate due process because employers' due process rights were adequately protected. Plaintiffs now appeal.

Discussion

I. Preemption

Federal preemption can be either express or implied. *See Fid. Fed. Sav. & Loan Ass'n v. de la Cuesta,* 458 U.S. 141, 152-53, 102 S.Ct. 3014, 73 L.Ed.2d 664 (1982). When a federal statute contains an explicit preemption provision, we are to "'identify the domain expressly pre-empted' by that language." *Medtronic, Inc. v. Lohr,* 518 U.S. 470, 484, 116 S.Ct. 2240, 135 L.Ed.2d 700 (1996) (quoting *Cipollone v. Liggett Group, Inc.,* 505 U.S. 504, 517, 112 S.Ct. 2608, 120 L.Ed.2d 407 (1992)). IRCA contains an express preemption clause in its provision creating sanctions for hiring unauthorized aliens. It preempts

all state sanctions "other than through licensing and similar laws." 8 U.S.C. § 1324a(h)(2). Plaintiffs contend that the Act is expressly preempted.

Implied preemption has two subcategories. *See Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525, 541, 121 S.Ct. 2404, 150 L.Ed.2d 532 (2001). The first is field preemption, where "the depth and breadth of a congressional scheme . . . occupies the legislative field." *Id.* (citing *Fid. Fed. Sav.*, 458 U.S. at 153, 102 S.Ct. 3014). The second is conflict preemption, which occurs when either "'compliance with both federal and state regulations is a physical impossibility,'" *Fid. Fed. Sav.*, 458 U.S. at 152, 102 S.Ct. 3014 (quoting *Fla. Lime & Avocado Growers, Inc.*, 373 U.S. 132, 142-43, 83 S.Ct. 1210, 10 L.Ed.2d 248 (1963)), or where "state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress," *id.* (internal quotation marks omitted) (quoting *Hines v. Davidowitz*, 312 U.S. 52, 67, 61 S.Ct. 399, 85 L.Ed. 581 (1941)). For conflict preemption to apply, the conflict must be an actual conflict, not merely a hypothetical or potential conflict. *See English v. Gen. Elec. Co.*, 496 U.S. 72, 89, 110 S.Ct. 2270, 110 L.Ed.2d 65 (1990). Plaintiffs contend that even if the entire Act is not expressly preempted, the mandatory requirement to use E-Verify is impliedly preempted because it conflicts with the voluntary program in IIRIRA.

A. The Act is not expressly preempted because it falls within IRCA's savings clause.

The explicit preemption provision in IRCA states: "The provisions of this section preempt any State or local law imposing civil or criminal sanctions (other than through licensing and similar laws) upon those who employ, or recruit or refer for a fee for employ-

ment, unauthorized aliens." 8 U.S.C. § 1324a(h)(2). The parties agree that the Act is expressly preempted by IRCA unless it falls within the savings clause of IRCA's express preemption provision. Plaintiffs argue that the Act does not fall within the savings clause because they contend the Act is not a "licensing law" within the ordinary meaning of the phrase, and that the savings clause was not intended to permit a state to create an adjudication and enforcement system independent of federal enforcement of IRCA violations.

The district court held that the plain language of section 1324a(h)(2) does not facially preempt the Act because it does no more than impose conditions on state licenses to do business and thus falls within the savings clause. *Ariz. Contractors Ass'n v. Candelaria*, 534 F.Supp.2d 1036, 1046-47 (D.Ariz.2008). The court rejected plaintiffs' argument that section 1324a(h)(2) permits only licensing sanctions that are preceded by a federal adjudication of employer liability, reasoning that neither the plain language of section 1324a(h)(2) nor the legislative history supports plaintiffs' position. *Id.* at 1046-48.

The district court also rejected plaintiffs' argument that the savings clause should be interpreted narrowly, holding that because regulation in the employment field is traditionally an area of state concern, there is a presumption against preemption. *Id.* at 1050-52. An issue central to our preemption analysis is thus whether the subject matter of the state law is in an area of traditionally state or federal presence. When Congress legislates "in a field which the States have traditionally occupied . . . . we start with the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of

Congress." *United States v. Locke*, 529 U.S. 89, 108, 120 S.Ct. 1135, 146 L.Ed.2d 69 (2000) (internal quotation marks omitted) (quoting *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230, 67 S.Ct. 1146, 91 L.Ed. 1447 (1947)). Conversely, we do not assume non-preemption "when the State regulates in an area where there has been a history of significant federal presence." *Id.*

A leading case involving the employment of illegal aliens is *De Canas v. Bica*, 424 U.S. 351, 96 S.Ct. 933, 47 L.Ed.2d 43 (1976). The Supreme Court there upheld a state law prohibiting the employment of unauthorized aliens against a preemption challenge because it concluded that the authority to regulate the employment of unauthorized workers is "within the mainstream" of the state's police powers. *Id.* at 356, 365, 96 S.Ct. 933. The Court reasoned that "the fact that aliens are the subject of a state statute does not render it a regulation of immigration, which is essentially a determination of who should or should not be admitted into the country, and the conditions under which a legal entrant may remain." *Id.* at 355, 96 S.Ct. 933.

Plaintiffs argue that reliance on *De Canas* is now misplaced because IRCA, passed after *De Canas*, brought the regulation of unauthorized employees within the scope of federal immigration law. They rely on language in a later case where the Court said that IRCA made the employment of unauthorized workers "central to '[t]he policy of immigration law.'" *Hoffman Plastic Compounds, Inc. v. NLRB*, 535 U.S. 137, 147, 122 S.Ct. 1275, 152 L.Ed.2d 271 (2002) (quoting *INS v. Nat'l Ctr. for Immigrants' Rights, Inc.*, 502 U.S. 183, 194 & n. 8, 112 S.Ct. 551, 116 L.Ed.2d 546 (1991)) (alteration in original). That case, however, did not involve preemption, or indeed

any state regulation. It considered whether the National Labor Relations Board ("NLRB") could award backpay to an unauthorized worker, and the Court held it could not. The Court said that the NLRB had impermissibly "trench[ed] upon federal statutes and policies unrelated to the [National Labor Relations Act]" by awarding backpay to an unauthorized alien worker who was improperly terminated from his employment for participating in union-related activities. *Id.* at 140, 141, 144, 122 S.Ct. 1275. Because it did not concern state law or the issue of preemption, *Hoffman* did not affect the continuing vitality of *De Canas*. We conclude that, because the power to regulate the employment of unauthorized aliens remains within the states' historic police powers, an assumption of non-preemption applies here.

Plaintiffs contend that the term "license" was intended to encompass only licenses to engage in specific professions, such as medicine or law, and not licenses to conduct business. There is no support for such an interpretation. "Licensing" generally refers to "[a] governmental body's process of issuing a license," *Black's Law Dictionary* 940 (8th ed.2004), and a "license" is "a permission, usually revocable, to commit some act that would otherwise be unlawful," *id.* at 938. The Act provides for the suspension of employers' licenses to do business in the state. *See* Ariz.Rev.Stat. § 23-212(F). Such licenses are defined as "any agency permit, certificate, approval, registration, charter or similar form of authorization that is required by law and that is issued by any agency for the purposes of operating a business in this state." *Id.* § 23-211(9)(a). The statute's broad definition of "license" is in line with the terms traditionally used and falls within the savings clause. The language of the savings clause therefore exempts such state li-

censing regulation from express preemption. A recent district court case that considered the same issue reached the same conclusion. *See Gray v. City of Valley Park,* No. 4:07CV00881 ERW, 2008 WL 294294, at *8, 10, 12 (E.D.Mo. Jan.31, 2008) (holding that city ordinance governing issuance and denial of business permits fell within meaning of savings clause). *But see Lozano v. City of Hazleton,* 496 F.Supp.2d 477, 519-21 (M.D.Pa.2007) (concluding that state law prohibiting employment of illegal aliens was expressly preempted by IRCA).

Plaintiffs nevertheless contend that the legislative history demonstrates that Congress intended the savings clause to permit states to impose a state sanction only after there had been a federal determination of an alien's unauthorized status. Plaintiffs rely on the second sentence in a paragraph from Part I of House Report 99-682, which as a whole states:

> The penalties contained in this legislation are intended to specifically preempt any state or local laws providing civil fines and/or criminal sanctions on the hiring, recruitment or referral of undocumented aliens. They are not intended to preempt or prevent lawful state or local processes concerning the suspension, revocation or refusal to reissue a license to any persor who has been found to have violated the sanctions provisions in this legislation. Further, the Committee does not intend to preempt licensing or "fitness to do business laws," such as state farm labor contractor laws or forestry laws, which specifically require such licensee or contractor to refrain from hiring, recruiting or referring undocumented aliens.

H.R.Rep. No. 99-682(i), at 58 (1986) *as reprinted in* 1986 U.S.C.C.A.N. 5649, 5662. As the district court

found, however, this paragraph as a whole does not support plaintiffs' argument. The paragraph describes the federal law as preempting "civil fines and/or criminal sanctions," neither of which the Act imposes. The paragraph does not suggest that the federal law would preempt local laws that suspend or revoke licenses on the basis of IRCA violations, or state licensing laws that require employers not to hire unauthorized workers. As the district court concluded, plaintiffs' reading of the second sentence, as permitting enforcement only of state licensing regulations conditioned on federally adjudicated violations, is contradicted by the third sentence, which recognizes states can condition an employer's "fitness to do business" on hiring documented workers. That is what the Arizona Act does.

In sum, the Act does not attempt to define who is eligible or ineligible to work under our immigration laws. It is premised on enforcement of federal standards as embodied in federal immigration law. The district court therefore correctly held that the Act is a "licensing" measure that falls within the savings clause of IRCA's preemption provision.

Plaintiffs finally contend that this kind of state regulation must be preempted because there is a potential for conflict in the practical operation of the state and federal law. They point to a hypothetical situation in which an employer may be subject to conflicting rulings from state and federal tribunals on the basis of the same hiring situation. Whether principles of comity or issue preclusion would allow such a result are questions not addressed by the parties. In any event, a speculative, hypothetical possibility does not provide an adequate basis to sustain a facial challenge. *See Crawford,* 128 S.Ct. at 1621.

B. The Act's provision mandating the use of E-Verify is not impliedly preempted by federal law.

Plaintiffs argue that the Arizona provision mandating the use of E-Verify is impliedly preempted because it conflicts with Congressional intent to keep the use voluntary. They contend that Congress wanted to develop a reliable and nonburdensome system of work-authorization verification, and that mandatory use of E-Verify impedes that purpose. They rely on the Supreme Court's decision in *Geier v. Am. Honda Motor Co.*, 529 U.S. 861, 120 S.Ct. 1913, 146 L.Ed.2d 914 (2000). *Geier* recognized that state laws that fall within a savings clause and are therefore not expressly preempted are still subject to the "ordinary working of conflict pre-emption principles." *Id.* at 869, 120 S.Ct. 1913. A state law is preempted through conflict preemption when it "'stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.'" *Id.* at 873, 120 S.Ct. 1913 (quoting *Hines*, 312 U.S. at 67, 61 S.Ct. 399). *Geier* involved a Department of Transportation regulation that was designed to encourage competition among automobile manufacturers to design effective and convenient passive-restraint systems. The regulation required only 10% of a car manufacturer's production to include airbags. The Court in *Geier* held that state tort law, permitting liability to be imposed for failure to provide airbags, conflicted with the federal policy to encourage development of different restraint systems. *Id.* at 886, 120 S.Ct. 1913.

The district court here held that Arizona's requirement that employers use E-Verify was not preempted because, while Congress made participation in E-Verify voluntary at the national level, that

did not in and of itself indicate that Congress intended to prevent states from making participation mandatory. *Ariz. Contractors,* 534 F.Supp.2d at 1055-56. We agree with that holding. Congress could have, but did not, expressly forbid state laws from requiring E-Verify participation. It certainly knew how to do so because, at the same time, it did expressly forbid "any State or local law imposing civil or criminal sanctions (other than through licensing and similar laws) upon those who employ, or recruit or refer for a fee for employment, unauthorized aliens." 8 U.S.C. § 1324a(h)(2).

Furthermore, this case is unlike *Geier,* where the Supreme Court found strong evidence of Congress's intent to promote competition and balance federal goals in a competitive environment encouraging alternative systems. Here, E-Verify is a federal government service that Congress has implicitly strongly encouraged by expanding its duration and its availability (to all fifty states). *See* Basic Pilot Program Extension and Expansion Act of 2003, Pub.L. No. 108-156, 117 Stat.1944, 1944; Basic Pilot Extension Act of 2001, Pub.L. No. 107-128, sec. 2, 115 Stat. 2407, 2407. Though Congress did not mandate E-Verify, Congress plainly envisioned and endorsed an increase in its usage. The Act's requirement that employers participate in E-Verify is consistent with and furthers this purpose, and thus does not raise conflict preemption concerns.

Appellants contend that conflict preemption is a concern here also because of the Act's potentially discriminatory effects. Their argument is that E-Verify increases discrimination against workers who look or sound "foreign," and that mandatory E-Verify usage thus upsets the enforcement/discrimination balance

that Congress has maintained by keeping E-Verify optional. This argument fails because Congress requires employers to use either E-Verify or I-9, and appellants have not shown that E-Verify results in any greater discrimination than I-9.

II. Due Process

The deprivation of a property interest must "'be preceded by notice and opportunity for hearing appropriate to the nature of the case.'" *Cleveland Bd. of Educ. v. Loudermill,* 470 U.S. 532, 542, 105 S.Ct. 1487, 84 L.Ed.2d 494 (1985) (quoting *Mullane v. Cent. Hanover Bank & Trust Co.,* 339 U.S. 306, 313, 70 S.Ct. 652, 94 L.Ed. 865 (1950)). An Arizona business license is a property interest. *See, e.g., Comeau v. Ariz. State Bd. of Dental Exam'rs,* 196 Ariz. 102, 993 P.2d 1066, 1070 (Ariz.Ct.App.1999). An opportunity to be heard must be "'at a meaningful time and in a meaningful manner.'" *Mathews v. Eldridge,* 424 U.S. 319, 333, 96 S.Ct. 893, 47 L.Ed.2d 18 (1976) (quoting *Armstrong v. Manzo,* 380 U.S. 545, 552, 85 S.Ct. 1187, 14 L.Ed.2d 62 (1965)). Employers thus should be given an opportunity to be heard before their business licenses are suspended or revoked under the Act.

The Act sets forth the procedures to be followed in bringing an enforcement action. Any person may submit a complaint about a suspected violation to either the Arizona Attorney General or a county attorney. Ariz.Rev.Stat. § 23-212(B). The Attorney General or county attorney investigating a complaint must verify the alleged unauthorized alien's work-authorization status with the federal government pursuant to 8 U.S.C. § 1373; the state official is prohibited from attempting to make an independent determination of the alien's status. *Id.* After a com-

plaint is investigated and found not to be false or frivolous, a county attorney must bring an enforcement action against the employer in state court in the county in which the alien was employed. *Id.* § 23-212(C), (D). The court is to expedite the action, which includes scheduling the hearing as quickly as is practicable. *Id.* § 23-212(E).

Subsection (H) of section 212 describes the state court's procedures to obtain information from the federal government on whether an alien was unauthorized to work:

> On [sic] determining whether an employee is an unauthorized alien, the court shall consider only the federal government's determination pursuant to 8 United States Code § 1373(c). The federal government's determination creates a rebuttable presumption of the employee's lawful status. The court may take judicial notice of the federal government's determination and may request the federal government to provide automated or testimonial verification pursuant to 8 United States Code § 1373(c).

Id. § 23-212(H). Section 1373(c) of title 8 of the U.S. Code provides that the Immigration and Naturalization Service "shall respond to an inquiry by a Federal, State, or local government agency, seeking to verify or ascertain the citizenship or immigration status of any individual within the jurisdiction of the agency for any purpose authorized by law, by providing the requested verification or status information." 8 U.S.C. § 1373(c).

Plaintiffs contend, in this facial challenge, that the Act violates due process because it deprives employers of their business licenses without providing them an adequate opportunity to dispute whether an

employee was authorized to work. Plaintiffs rely on the first sentence of subsection (H) to argue that the Act prohibits employers at the state-court hearing from presenting any evidence to rebut the federal government's § 1373 response on the issue of the employee's work status. Defendants, however, point to the second sentence of subsection (H), which provides that the federal response creates only a rebuttable presumption. They contend that the employer can rebut the federal response with other evidence during a hearing.

Plaintiffs' interpretation of subsection (H) is flawed because it gives no meaning to the second sentence of the provision. That sentence at least implicitly contemplates a hearing to rebut the presumption created by the federal determination of an employee's unauthorized status. *See* Ariz.Rev.Stat. § 23-212(H). Arizona law, consistent with ordinary principles of statutory interpretation, requires that "'[e]ach word, phrase, clause, and sentence [of a statute] must be given meaning so that no part will be void, inert, redundant, or trivial.'" *Williams v. Thude,* 188 Ariz. 257, 934 P.2d 1349, 1351 (Ariz.1997) (second alteration in original) (emphasis omitted) (quoting *City of Phoenix v. Yates,* 69 Ariz. 68, 208 P.2d 1147, 1149 (Ariz.1949)). We conclude that the statute provides an employer the opportunity, during the state court proceeding, to present rebuttal evidence.

Furthermore, defendants explain any apparent incongruity between the first two sentences of subsection (H) by pointing to parallel language found in an earlier subsection, subsection (B), which relates to the initial investigation of a complaint:

> When investigating a complaint, the attorney general or county attorney shall verify the work

> authorization of the alleged unauthorized alien with the federal government pursuant to 8 United States Code § 1373(c). A state, county or local official shall not attempt to independently make a final determination on whether an alien is authorized to work in the United States.

Ariz.Rev.Stat. § 23-212(B). Defendants explain that this section, like the first sentence of subsection (H), provides, somewhat inartfully, that the initial investigation and the basis for bringing an enforcement action must be limited to the federal response, thereby precluding independent state investigation. The employer would then have the opportunity to present evidence. The district court agreed. The district court persuasively reasoned that requiring the state or county to obtain a federal determination of an employee's work status before bringing proceedings may be intended to protect employees from direct investigation by the state.

We therefore conclude that the district court correctly determined that the Act provides sufficient process to survive this facial challenge. More importantly, the district court also found that the statute does not preclude the presentation of counterevidence when an employer's liability is at issue, *Ariz. Contractors*, 534 F.Supp.2d at 1058, and we agree with this interpretation. An employer's opportunity to present evidence at a hearing in superior court, in order to rebut the presumption of the employee's unauthorized status, provides the employer a meaningful opportunity to be heard before sanctions are imposed. We conclude that subsection (H) is facially constitutional.

The district court's judgment is AFFIRMED.

APPENDIX C

UNITED STATES DISTRICT COURT,
D. ARIZONA.

Nos. CV07-02496-PHX-NVW,
CV07-02518-PHX-NVW.

ARIZONA CONTRACTORS ASSOCIATION, INC., AN ARIZONA NONPROFIT CORPORATION; ARIZONA EMPLOYERS FOR IMMIGRATION REFORM, INC., AN ARIZONA NON-PROFIT CORPORATION; CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA, A WASHINGTON D.C. NON-PROFIT CORPORATION; ARIZONA CHAMBER OF COMMERCE, AN ARIZONA NON-PROFIT CORPORATION; ARIZONA HISPANIC CHAMBER OF COMMERCE, INC., AN ARIZONA NON-PROFIT CORPORATION; ARIZONA FARM BUREAU FEDERATION, AN ARIZONA NON-PROFIT CORPORATION; ARIZONA RESTAURANT AND HOSPITALITY ASSOCIATION, AN ARIZONA NON-PROFIT CORPORATION; ASSOCIATED MINORITY CONTRACTORS OF AMERICA, AN ARIZONA NON-PROFIT LIMITED LIABILITY COMPANY; ARIZONA ROOFING CONTRACTORS ASSOCIATION, AN ARIZONA NON-PROFIT CORPORATION; NATIONAL ROOFING CONTRACTORS' ASSOCIATION, AN ILLINOIS NOT-FOR-PROFIT CORPORATION; WAKE UP ARIZONA! INC., AN ARIZONA NON-PROFIT CORPORATION; AND ARIZONA LANDSCAPE CONTRACTORS ASSOCIATION, INC., AN ARIZONA NON-PROFIT CORPORATION,

Plaintiffs,

v.

CRISS CANDELARIA, APACHE COUNTY ATTORNEY; ED RHEINHEIMER, COCHISE COUNTY ATTORNEY; TERENCE

C. HANER, COCONINO COUNTY ATTORNEY; DAISY FLORES, GILA COUNTY ATTORNEY; KENNY ANGLE, GRAHAM COUNTY ATTORNEY; DEREK D. RAPIER, GREENLEE COUNTY ATTORNEY; MARTIN BRANNAN, LAPAZ COUNTY ATTORNEY; ANDREW P. THOMAS, MARICOPA COUNTY ATTORNEY; MATTHEW J. SMITH, MOHAVE COUNTY ATTORNEY; JAMES CURRIER, NAVAJO COUNTY ATTORNEY; BARBARA LAWALL, PIMA COUNTY ATTORNEY; JAMES P. WALSH, PINAL COUNTY ATTORNEY; GEORGE SILVA, SANTA CRUZ COUNTY ATTORNEY; SHEILA POLK, YAVAPAI COUNTY ATTORNEY; JON SMITH, YUMA COUNTY ATTORNEY; TERRY GODDARD, ATTORNEY GENERAL OF THE STATE OF ARIZONA; AND FIDELIS V. GARCIA, DIRECTOR OF THE ARIZONA REGISTRAR OF CONTRACTORS,

Defendants.

VALLE DEL SOL, INC.; CHICANOS POR LA CAUSA, INC.; AND SOMOS AMERICA,

Plaintiffs,

v.

TERRY GODDARD, IN HIS OFFICIAL CAPACITY AS ATTORNEY GENERAL OF THE STATE OF ARIZONA; GALE GARRIOTT, IN HIS OFFICIAL CAPACITY AS THE DIRECTOR OF THE ARIZONA DEPARTMENT OF REVENUE; AND ANDREW THOMAS, IN HIS OFFICIAL CAPACITY AS MARICOPA COUNTY ATTORNEY,

Defendants.

Feb. 7, 2008.

FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER

NEIL V. WAKE, District Judge.

Plaintiffs present a facial challenge to the validity of the Legal Arizona Workers Act ("the Act"), A.R.S. §§ 23-211 to 23-214 (Supp.2007), enacted July 2, 2007, and effective January 1, 2008. 2007 Ariz. Sess. Laws, Ch. 279. The Act provides the Superior Court of Arizona with the power to suspend or revoke the business licenses of employers who intentionally or knowingly employ unauthorized aliens. By agreement of the parties, the two cases were consolidated and accelerated for trial on January 16, 2008, on stipulated facts and written evidence. This order states findings of fact and conclusions of law pursuant to Federal Rule of Civil Procedure 52(a).

I. Background

A. Procedural History and Related Proceedings

These consolidated actions are refilings, with some changes in parties, of consolidated actions dismissed December 7, 2007, for lack of jurisdiction under Article III of the United States Constitution. *Arizona Contractors Ass'n v. Napolitano* (*Arizona Contractors I*), 526 F.Supp.2d 968 (D.Ariz.2007). Plaintiffs appealed that judgment of dismissal and sought an injunction pending appeal. They concurrently filed this action (*Arizona Contractors II*), naming the county attorneys of Arizona as defendants and seeking a temporary restraining order and preliminary injunction against the Act's enforcement. Plaintiffs' motions for injunctions pending appeal in *Arizona Contractors I* and for temporary restraining orders in *Arizona*

Contractors II were heard on December 18 and denied on December 21, 2007. (*Arizona Contractors I*, Doc. # 106; *Arizona Contractors II*, Doc. # 75.)

The parties then stipulated to hold a consolidated preliminary injunction hearing and trial on the merits in this case on January 16, 2008. (Doc. # 135.) At that hearing, the County Attorney Defendants acknowledged that it would take them weeks or months to investigate complaints and initiate any proceedings under the Act. They avowed that they would carry out their duties without intentional delay, but that they could and would bring no proceedings before March. The Joint Statement of Stipulated Facts includes all of the evidence from *Arizona Contractors I* with extensive additions.

The Plaintiffs are the same as in *Arizona Contractors I*, with the addition of Plaintiff Valle Del Sol, Inc., a non-profit corporation that employs many workers in Arizona and holds various business licenses. Plaintiffs have dropped the Governor as a defendant and have added the County Attorneys and the Arizona Registrar of Contractors. In light of the rulings in *Arizona Contractors I*, the Defendants have stipulated not to contest Plaintiffs' standing before this court, but have reserved the right to raise the issue on appeal. (Doc. # 96, 106.) The actions will be dismissed as against the Attorney General for lack of justiciable case or controversy for the reasons stated in *Arizona Contractors I*, which the court does not understand the Attorney General to be abandoning.

B. State and Federal Sanctions for Employing Unauthorized Workers

The court's December 7, 2007 order in *Arizona Contractors I* explained the implicated statutes and

made findings of fact, most of which apply equally to this case. 2007 WL 4293641, at *2-7. That discussion is incorporated into this order with the following summary and the following additional and, where noted, different findings. With the benefit of additional briefing and study, the court finds it unnecessary to resolve some of the legal questions noted in its previous orders in *Arizona Contractors I* and raised in this case.

The federal government first created sanctions for employers of unauthorized aliens in the Immigration Reform and Control Act of 1986 ("IRCA"), Pub.L. No. 99-603, 100 Stat. 3359 (employer sanctions provisions codified at 8 U.S.C. § 1324a to 1324c (2000)). States at that time had authority to enact and enforce sanctions against employers of unauthorized aliens. *See De Canas v. Bica*, 424 U.S. 351, 96 S.Ct. 933, 47 L.Ed.2d 43 (1976). Indeed, at least twelve states had employer sanctions statutes that proscribed "knowing" employment of unauthorized aliens. *U.S. Immigration Policy and the National Interest, Staff Report of the Select Commission on Immigration and Refugee Policy* 565 (1981).

IRCA expanded those state efforts to the national level. Congress also declared that IRCA "preempt[s] any State or local law imposing civil or criminal sanctions (other than through licensing or similar laws) upon those who employ, or recruit or refer for a fee for employment, unauthorized aliens." 8 U.S.C. § 1324a(h)(2). Under federal enforcement of IRCA, an administrative law judge adjudicates whether an employer knowingly employed an unauthorized alien, and the decision is subject to judicial review. Congress also created an employment eligibility verification system based on Form I-9, which requires

employees to swear that they have authorization to work and requires employers to examine specific identification documents for facial validity. § 1324a(b).

Congress realized that the I-9 system was imperfect. In IRCA's text, it authorized evaluation and change of the employment verification system:

> The President shall provide for the monitoring and evaluation of the degree to which the employment verification system . . . provides a secure system to determine employment eligibility in the United States and shall examine the suitability of existing Federal and State identification systems for use for this purpose.
>
> To the extent that the system established under subsection (b) is found not to be a secure system to determine employment eligibility in the United States, the President shall . . . implement such changes . . . as may be necessary to establish a secure system to determine employment eligibility in the United States.

§ 1324a(d). Congress later passed the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 ("IIRIRA"), Pub.L. No. 104-208, §§ 401-405, 110 Stat. 3009, 3009-655 to 3009-665 (note following 8 U.S.C. § 1324a (2000)), which directed the Attorney General to conduct three pilot programs to improve the employment verification system. In a section entitled "Voluntary Election to Participate in a Pilot Program," IIRIRA specified that "any person or other entity that conducts any hiring (or recruitment or referral) in a State in which a pilot program is operating may elect to participate in that pilot program . . . the Attorney General may not require any person or

other entity to participate in a pilot program." § 402, 110 Stat. at 3009-656.

One of the systems created by IIRIRA was formerly known as the Basic Pilot. The Basic Pilot Program Extension and Expansion Act of 2003 ("Expansion Act"), Pub.L. No. 108-156, 117 Stat. 1944 (note following 8 U.S.C. § 1324a (Supp.IV.2000)), amended IIRIRA to make the Basic Pilot available to employers in all fifty states, extend its authorization until November, 2008, and place the Secretary of Homeland Security in charge of the program. The Basic Pilot is now known as the Web Basic Pilot or E-Verify. This primarily internet-based system reports the work authorization status of a new hire to an employer by checking records at the Social Security Administration (SSA) and Department of Homeland Security (DHS) U.S. Citizenship and Immigration Services (USCIS). When the system provides a tentative nonconfirmation, the employee has an opportunity to contact SSA or USCIS, using instructions provided by the employer, to clear up his records. If the employee is successful, the E-Verify databases are updated. If the employee fails to contest the nonconfirmation or is unsuccessful in doing so, E-Verify issues a final nonconfirmation to the employer, who must then terminate the employee or face a presumption that it violated IRCA. (Facts, Doc. # 148, Ex. 7, E-Verify Memorandum of Understanding, Art. II § C ¶ 9, Art. III; Doc. # 152, Ex. 52, Findings of the Web Basic Pilot Evaluation 11-15, Sept. 2007.)

In the December 7, 2007 order dismissing *Arizona Contractors I*, the court made findings of fact regarding employers' costs to set-up and operate E-Verify. With the benefit of the most recent survey data on E-Verify published in September 2007, the court

now finds that the cost to employers is considerably less than previously determined. The average cost to set-up E-Verify is $125, with 85% of employers spending $100 or less. The average annual operation cost is $728, with 75% of employers spending $100 or less annually. (Facts, Doc. # 152, Ex. 52 at 104.) Though this is considerably less than the modest expenses the court found in *Arizona Contractors I*, such costs of compliance are still sufficient to provide Plaintiffs with standing.

Because E-Verify remains voluntary at the national level, the I-9 process is still the main employment verification process used by employers. However, the I-9 system has been thoroughly defeated by document and identity fraud, allowing upwards of eleven million unauthorized workers to gain employment in the United States labor force, with the number increasing at about a half a million a year. (Facts, Doc. # 149, Ex. 15 at 1-3.)

The Act, A.R.S. §§ 23-211 to 23-214, is a conscious attempt to address this problem at the State level by imposing sanctions by "licensing and similar laws" upon those who employ unauthorized aliens, as expressly permitted by IRCA. Under the Act, county attorneys may bring suit in the Superior Court of Arizona against employers for intentionally or knowingly employing unauthorized aliens. An employer found liable faces possible suspension or revocation of its business licenses, and it can be ordered to file quarterly reports of new hires and to file an affidavit that it has terminated all unauthorized aliens. A.R.S. § 23-212(F).

The Act adopts IRCA's definition of "unauthorized alien," A.R.S. § 23-211(8), which means an alien who is not "lawfully admitted for permanent residence,

or . . . authorized to be so employed by [IRCA] or by the Attorney General," 8 U.S.C. § 1324a(h)(3). The Act also relies on the federal determination of a person's immigration status and employment authorization. According to federal law, "[n]otwithstanding any other provision of Federal, State, or local law," federal, state, and local government entities may request from USCIS (formerly the INS) "information regarding the immigration status, lawful or unlawful, of any individual." 8 U.S.C. § 1373(a) and (b) (2000) (enacted by IIRIRA § 642, 110 Stat. at 3009-707). USCIS has an affirmative obligation to provide "verification or status information" requested by state and local entities "for any purpose authorized by law." § 1373(c).

In responding to § 1373 requests, USCIS accesses the Verification Information System, which is the same database that it uses to process E-Verify requests. Privacy Act: Verification Information System Records Notice, 72 Fed.Reg. 17,569 (Apr. 9, 2007). DHS reports that routine uses of the database are to provide information to "Federal, State, tribal, and local government agencies seeking to verify or determine the citizenship or immigration status of any individual within the jurisdiction of the DHS as authorized or required by law" and to [sic] "to enable [such] agencies to make decisions concerning: (1) Determination of eligibility for a Federal, State, or local public benefit; (2) issuance of a license or grant; or (3) government-issued credential." *Id.* at 17,571-72. USCIS also uses this system to respond to state requests to verify the citizenship and immigration status of individuals seeking government benefits under the Systematic Alien Verification for Entitlements (SAVE) program. *Id.* at 17,569.

The Act utilizes § 1373 to obtain a person's immigration and work authorization status. First, it states that when the attorney general and county attorneys investigate complaints, they "shall not attempt to independently make a final determination on whether an alien is authorized to work in the United States." Rather, they must use § 1373 to verify the alien's "immigration status or work authorization status" with USCIS. A.R.S. § 23-212(B). Second, when the county attorney brings a case, the Superior Court proceeds as follows:

> On determining whether an employee is an unauthorized alien, the court shall consider only the federal government's determination pursuant to 8 United States Code section 1373(c). The federal government's determination creates a rebuttable presumption of the employee's lawful status. The court may take judicial notice of the federal government's determination and may request the federal government to provide automated or testimonial verification pursuant to 8 United States Code section 1373(c).

A.R.S. § 23-212(H). In a separate section, the Act also requires that after December 31, 2007, "every employer, after hiring an employee, shall verify the employment eligibility of the employee through the basic pilot program." A.R.S. § 23-214.

C. Burden in a Facial Challenge

Plaintiffs "face a heavy burden in seeking to have [the Act] invalidated as facially unconstitutional." *Rust v. Sullivan*, 500 U.S. 173, 183, 111 S.Ct. 1759, 114 L.Ed.2d 233 (1991). "A facial challenge to a legislative Act is, of course, the most difficult challenge to mount successfully, since the challenger must es-

tablish that no set of circumstances exists under which the Act would be valid." *Engine Mfrs. Ass'n v. S. Coast Air Quality Maint. Dist.*, 498 F.3d 1031, 1048 (9th Cir.2007) (quoting *United States v. Salerno*, 481 U.S. 739, 745, 107 S.Ct. 2095, 95 L.Ed.2d 697 (1987)). "The fact that the regulations might operate unconstitutionally under some conceivable set of circumstances is insufficient to render them wholly invalid." *Rust*, 500 U.S. at 183, 111 S.Ct. 1759 (quoting *Salerno*, 481 U.S. at 745, 107 S.Ct. 2095).

II. Federal Preemption Standards

"[U]nder our federal system, the States possess sovereignty concurrent with that of the Federal Government, subject only to limitations imposed by the Supremacy Clause [of the United States Constitution]." *Tafflin v. Levitt*, 493 U.S. 455, 458, 110 S.Ct. 792, 107 L.Ed.2d 887 (1990). The Supremacy Clause gives Congress the power to exclude state legislation in a field as Congress defines it, so long as Congress is acting within the powers granted it under the Constitution. However, where "federal law is said to bar state action in fields of traditional state regulation, . . . [courts proceed] on the assumption that the historic police powers of the States were not . . . superseded by the Federal Act unless that was the clear and manifest purpose of Congress." *Cal. Div. of Labor Standards Enforcement v. Dillingham Constr., N.A., Inc.*, 519 U.S. 316, 325, 117 S.Ct. 832, 136 L.Ed.2d 791 (1997) (quoting *N.Y. State Conference of Blue Cross & Blue Shield Plans v. Travelers Ins. Co.*, 514 U.S. 645, 655, 115 S.Ct. 1671, 131 L.Ed.2d 695 (1995)). Conversely, "an 'assumption' of nonpreemption is not triggered when the State regulates in an area where there has been a history of significant federal presence." *United States v. Locke*, 529 U.S. 89,

108, 120 S.Ct. 1135, 146 L.Ed.2d 69 (2000). The intent of Congress is the "touchstone" of any preemption analysis. *Retail Clerks Int'l Ass'n v. Schermerhorn*, 375 U.S. 96, 103, 84 S.Ct. 219, 11 L.Ed.2d 179 (1963).

Federal preemption can be either "explicitly stated in [a] statute's language or implicitly contained in its structure and purpose." *Gade v. Nat'l Solid Wastes Mgmt. Ass'n*, 505 U.S. 88, 98, 112 S.Ct. 2374, 120 L.Ed.2d 73 (1992) (plurality opinion) (citations omitted). Where Congress has explicitly provided that federal law is to be exclusive in a given field, states cannot regulate in that field, even if their efforts complement or further federal objectives. *See, e.g., Morales v. TWA*, 504 U.S. 374, 387, 112 S.Ct. 2031, 119 L.Ed.2d 157 (1992) (stating that an express preemption provision may displace "all state laws that fall within its sphere, even including state laws that are consistent with [the federal law's] substantive requirements."). Congress also has preempted an entire field where federal law is "so pervasive as to make reasonable the inference that Congress left no room for the States to supplement it." *Gade*, 505 U.S. at 98, 112 S.Ct. 2374 (citations omitted).

Where Congress has enacted federal law on a given subject, but evinces no express or implied intention to preempt the field, states retain the power to regulate in the area concurrently with the federal government. Any regulation enacted by the states must not, however, conflict with federal law. A state law conflicts with federal law "where compliance with both federal and state regulations is a physical impossibility, or where state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Id.* (citing *Hines v. Davidowitz*,

312 U.S. 52, 67, 61 S.Ct. 399, 85 L.Ed. 581 (1941)). The conflict posed must be more than "hypothetical" or "potential"; rather, the state statute must have an effect that "actually" and "irreconcilably" conflicts with Congress' intent. *English v. General Elec. Co.*, 496 U.S. 72, 79, 90, 110 S.Ct. 2270, 110 L.Ed.2d 65 (1990); *Rice v. Norman Williams Co.*, 458 U.S. 654, 659, 102 S.Ct. 3294, 73 L.Ed.2d 1042 (1982).

III. The Immigration Reform and Control Act Expressly Authorizes, Rather Than Preempts, the Licensing Sanctions in the Act

When Congress enacted IRCA, it expressly preempted some state powers and expressly preserved other state powers. The task at hand is to "identify the domain expressly preempted" by IRCA's language and give fair meaning to its savings clause for state employment sanctions through licensing and similar laws. *Air Conditioning & Refrigeration Inst. v. Energy Res. Conservation & Dev. Comm'n*, 410 F.3d 492, 495 (9th Cir.2005) (citing *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 484, 116 S.Ct. 2240, 135 L.Ed.2d 700 (1996)). "Since pre-emption claims turn on Congress's intent, we begin as we do in any exercise of statutory construction with the text of the provision in question, and move on, as need be, to the structure and purpose of the Act in which it occurs." *Id.* (quoting *Travelers Ins. Co.*, 514 U.S. at 655, 115 S.Ct. 1671).

A. The Plain Language of 8 U.S.C. § 1324a(h)(2) Authorizes State Licensing Sanctions

Section 1324a(h)(2) of Title 8, U.S.C., provides:

> The provisions of this section [8 U.S.C. § 1324a] preempt any State or local law imposing civil or criminal sanctions (*other than through licensing*

> *and similar laws*) upon those who employ, or recruit or refer for a fee for employment, unauthorized aliens.

(Emphasis added.) By this section, states may not impose "civil or criminal sanctions" upon employers of unauthorized aliens, "other than through licensing and similar laws." Therefore, if the Act constitutes a licensing or similar law, it is expressly authorized by IRCA's savings clause.

The Act authorizes state courts to suspend or revoke the business licenses of employers who knowingly or intentionally employ unauthorized aliens. A.R.S. § 23-212(A) and (F). By the terms of the Act, "license" means any state or local "authorization that is required by law and that is issued . . . for the purposes of operating a business in this state." § 23-211(7)(a). It includes articles of incorporation, a certificate of partnership, a foreign corporation registration, and a transaction privilege (sales) tax license, but not a professional license. § 23-211(7)(b) and (c). The Act's definition of license does not depart from common sense or traditional understandings of what is a license. A license is a "permission, usually revocable, to commit some act that would otherwise be unlawful." *Black's Law Dictionary* 938 (8th ed.2004). The Act is a "licensing law" because it sets out criteria and a process to suspend or revoke a permission to do business in the state. It therefore falls within the plain meaning of IRCA's savings clause.

Plaintiffs argue that Congress intended a narrow construction of licensing laws, concerned only with a person's fitness to receive a license. This construction ignores that licenses are revokable, so states must have the power to create revocation criteria and procedures. Plaintiffs would also have the Act invali-

dated because its definition of license reaches some legal instruments that allegedly do not supply permission to do business in the state. Even if this were the case, the Act is not facially invalid if its definition sometimes exceeds the savings clause for "licensing laws." Plaintiffs are free to raise this defense if and when the State applies its law to revoke a legal instrument that falls outside of the definition of "license."

B. The Licensing Sanction Authorization is Not Conditioned on Completed Federal Proceedings Against the Violator; the Legislative History Does Not So State and Could Not Defeat the Statutory Language if it Did

Plaintiffs contend that the § 1324a(h)(2) authorization of state licensing sanctions allows sanctions only on employers who already have been found liable in completed federal proceedings under IRCA. Plaintiffs base their argument on a sentence in the House Judiciary Committee Report on IRCA. H.R.Rep. No. 99-682(I), at 58 (1986), *reprinted in* 1986 U.S.C.C.A.N. 5649, 5662. The legislative history does not substantiate Plaintiffs' interpretation, but even if it did, it could not change or add words to the statute.

The language of the statute that Congress approved, not language from the House Report concerning the statute, controls. *Exxon Mobil Corp. v. Allapattah Servs., Inc.*, 545 U.S. 546, 568, 125 S.Ct. 2611, 162 L.Ed.2d 502 (2005) ("[T]he authoritative statement is the statutory text, not the legislative history."); *Hoffman Plastic Compounds, Inc. v. NLRB*, 535 U.S. 137, 150 n. 4, 122 S.Ct. 1275, 152 L.Ed.2d 271 (2002) (describing House Report No. 99-682 as a "single Committee Report from one House of a

politically divided Congress" and noting that the dissent's reliance on the report "is a rather slender reed"); *Sprietsma v. Mercury Marine*, 537 U.S. 51, 62-63, 123 S.Ct. 518, 154 L.Ed.2d 466 (2002) (quoting *CSX Transp., Inc. v. Easterwood*, 507 U.S. 658, 664, 113 S.Ct. 1732, 123 L.Ed.2d 387 (1993)) (asserting that express preemption analysis focuses on the plain wording of the statute, "which necessarily contains the best evidence of Congress' pre-emptive intent."). IRCA's savings clause does not contain any language indicating that prior federal enforcement action is necessary before a state may sanction an employer's license. Plaintiffs' interpretation would reduce the express authorization of state "licensing and similar laws" almost to nothing, in contravention of the plain language of the statute.

In any event, the legislative history, and the House Report in particular, do not compel the meaning Plaintiffs urge. After the *De Canas* decision, Congressional bills calling for federal employer sanctions began to contain preemption clauses for the first time. *See, e.g.*, S. 2252, 95th Cong. § 5 (1976); H.R. 9531, 95th Cong. § 5 (1976). None passed. In following sessions of Congress, bills were introduced that included preemption clauses similar to those of the 95th Congress. *See* S. 1765, 97th Cong. (1981); H.R. 4832, 97th Cong. (1981); S. 2222, 97th Cong. (1982); H.R. 5872, 97th Cong. (1982); S. 529, 98th Cong. (1983); H.R. 1510, 98th Cong. (1983). Again, none passed.

However, in the 99th Congress, S. 1200 and H.R. 3810 contained preemption clauses that for the first time included the exception "other than through licensing and similar laws." Unlike the earlier bills, S. 1200 was enacted and became the Immigration Reform and Control Act of 1986. The Senate Judi-

ciary Committee Report on S. 1200, dated August 25, 1985, did not comment on the express authorization of state licensing and similar laws, and the Senate passed the bill on September 19, 1985. *See* S.Rep. No. 99-132 (1985). One of four House Committee Reports on H.R. 3810, however, the House Judiciary Committee Report dated July 16, 1986, did comment on the licensing exception to preemption:

> The penalties contained in this legislation are intended to specifically preempt any state or local laws providing civil fines and/or criminal sanctions on the hiring, recruitment or referral of undocumented aliens.
>
> They are not intended to preempt or prevent lawful state or local processes concerning the suspension, revocation or refusal to reissue a license to any person who has been found to have violated the sanctions provisions in this legislation. Further, the Committee does not intend to preempt licensing or "fitness to do business laws," such as state farm labor contractor laws or forestry laws, which specifically require such licensee or contractor to refrain from hiring, recruiting or referring undocumented aliens.

H.R.Rep. No. 99-682(I), at 58 (1986), *reprinted in* 1986 U.S.C.C.A.N. 5649, 5662 ("House Report"). The conference committee report said nothing about preemption. *See* H. Conf. Rep. No. 99-1000 (1986), *reprinted in* 1986 U.S.C.C.A.N. 5840. Therefore, whatever the meaning of the House Judiciary Committee Report's comment, it was not before the Senate when it approved the bill. The text of the House Report also does not support Plaintiffs' argument. Their interpretation overlooks the first quoted sentence, which paraphrases the bill as preempting only

state "civil fines" and "criminal sanctions." The Arizona Act imposes no fines or criminal sanctions. Plaintiffs rely on the second quoted sentence, which no doubt correctly states that state licensing processes are not preempted as to "any person who has been found to have violated the sanctions provisions of this legislation." But Plaintiffs go further and assert that the example given in that sentence exhausts the entire meaning of the licensing sanction authorization. The passage does not so state, and the very next sentence gives further examples of permitted licensing and fitness to do business laws that are not tied to completed federal proceedings. One need look only to the sentence after the one Plaintiffs rely upon to see that the House Report does not bear the meaning they would give it.

Finally, if the House Report did mean what Plaintiffs contend, such an attempt to override the plain language of the statute would be precisely the kind of excess that the modern view of legislative history illegitimates. The Members or their staff must write amendments into the bill, not into the Report.

C. The Structure and Purpose of IRCA Do Not Support Plaintiffs' Restrictive Interpretation of the Savings Clause

Congress expressly preempted some state powers and expressly affirmed other state powers when it passed IRCA. "[A]n express definition of the pre-emptive reach of a statute 'implies'—*i.e.*, supports a reasonable inference—that Congress did not intend to pre-empt other matters." *Freightliner Corp. v. Myrick*, 514 U.S. 280, 288, 115 S.Ct. 1483, 131 L.Ed.2d 385 (1995). *See also Sprietsma v. Mercury Marine*, 537 U.S. 51, 69, 123 S.Ct. 518, 154 L.Ed.2d 466 (2002) (citing *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504,

517, 547, 112 S.Ct. 2608, 120 L.Ed.2d 407 (1992)); *Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525, 541, 121 S.Ct. 2404, 150 L.Ed.2d 532 (2001) (plurality opinion). Because IRCA contains both an express preemption provision and a savings clause, Congress has defined the scope of its preemptive intent with respect to laws prohibiting the employment of unauthorized aliens. Plaintiffs nevertheless urge that the structure and purpose of IRCA create an inference of field preemption and require a narrow interpretation of the § 1324a(h)(2) savings clause, which will deprive the states of all practical power. For the sake of thoroughness, that contention is now addressed.

Unlike interstate transportation, foreign affairs, and even immigration, employment of unauthorized aliens is neither intrinsically nor historically an exclusive concern of the federal government such "that the federal system will be assumed to preclude enforcement of state laws on the same subject." *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230, 67 S.Ct. 1146, 91 L.Ed. 1447 (1947). To the contrary, the Supreme Court held in *De Canas v. Bica*, 424 U.S. 351, 96 S.Ct. 933, 47 L.Ed.2d 43 (1976), that the states have strong local interests in prohibiting the employment of unauthorized aliens. In *De Canas*, a California statute prohibited employers from hiring aliens who were not entitled to lawful residence in the United States if the employment would adversely affect lawful resident workers. The Supreme Court held that federal law did not preempt California's law. It stated that "the Court has never held that every state enactment which in any way deals with aliens is a regulation of immigration and thus per se pre-empted by [the federal government's] constitutional power [to regulate immigration]." The California law did not regulate immigration because it did

not determine "who should or should not be admitted into the country, and the conditions under which a legal entrant may remain." *Id.* at 355, 96 S.Ct. 933.

The Court also found no implied field preemption because "States possess broad authority under their police powers to regulate the employment relationship and protect workers within the State."

> [State attempts] to prohibit the knowing employment by . . . employers of persons not entitled to lawful residence in the United States, let alone to work here, [are] *certainly within the mainstream of such police power regulation.* Employment of illegal aliens in times of high unemployment deprives citizens and legally admitted aliens of jobs; acceptance by illegal aliens of jobs on substandard terms as to wages and working conditions can seriously depress wage scales and working conditions of citizens and legally admitted aliens; and employment of illegal aliens under such conditions can diminish the effectiveness of labor unions. These local problems are particularly acute . . . in light of the significant influx into [a border state] of illegal aliens from neighboring Mexico.

Id. at 356-57, 96 S.Ct. 933 (emphasis added). The Court reiterated this conclusion several years later in *Plyler v. Doe*, 457 U.S. 202, 102 S.Ct. 2382, 72 L.Ed.2d 786 (1982). That case did not concern preemption, but the Court noted:

> Although the State has no direct interest in controlling entry into this country, that interest being one reserved by the Constitution to the Federal Government, unchecked unlawful migration might impair the State's economy generally,

> or the State's ability to provide some important service. Despite the exclusive federal control of this Nation's borders, we cannot conclude that the States are without any power to deter the influx of persons entering the United States against federal law, and whose numbers might have a discernible impact on traditional state concerns.

Id. at 228 n. 23, 102 S.Ct. 2382.

1. IRCA Does Not Clearly Evidence Congressional Intent to Prevent States From Independently Revoking the Business Licenses of Those Who Knowingly Employ Unauthorized Aliens

Plaintiffs argue that in IRCA, passed after *De Canas*, Congress carefully balanced competing policy interests surrounding employer sanctions, including the tension among enforcement, the risk of increased discrimination, and employer burdens. They say that Congress could not have intended to permit the State to revoke a business's license, a sanction they say is disproportionate to the direct federal sanctions. They would restrict the states' power of licensing sanctions to the narrowest of limits—so narrow that it would lack deterrence and not be worth the cost of enforcement to the State. Plaintiffs cite no case holding that Congress impliedly so cabined the states' residual police powers in this area of great and pervasive local import.

Plaintiffs do point to the Supreme Court's statement in *Hoffman Plastic Compounds, Inc. v. N.L.R.B.*—a case that did not involve federal preemption—that IRCA is a "comprehensive scheme prohibiting the employment of illegal aliens in the United

States," through which the federal government "'forcefully' made combating the employment of illegal aliens central to 'the policy of immigration law.'" 535 U.S. 137, 147, 122 S.Ct. 1275, 152 L.Ed.2d 271 (2002) (quoting another non-preemption case, *INS v. National Center for Immigrants' Rights, Inc.*, 502 U.S. 183, 194 n. 8, 112 S.Ct. 551, 116 L.Ed.2d 546 (1991)). That statement did not find an intent to displace state police power over employers of unauthorized aliens, and Congressional intent is the touchstone of field preemption analysis. *Retail Clerks Int'l Ass'n*, 375 U.S. at 103, 84 S.Ct. 219. The Court's holding in *Hoffman* did not overrule its prior decision in *De Canas* or contradict its statement in *Plyler*.

Plaintiffs also argue that courts should "decline to give broad effect to saving clauses where doing so would upset the careful regulatory scheme established by federal law." *Locke*, 529 U.S. at 106, 120 S.Ct. 1135 (citations omitted). *See also Geier v. Am. Honda Motor Co.*, 529 U.S. 861, 870, 120 S.Ct. 1913, 146 L.Ed.2d 914 (2000) (quoting *Locke*, 529 U.S. at 106, 120 S.Ct. 1135). The cases cited by the Supreme Court in these two opinions, *American Telephone & Telegraph Co. v. Central Office Telephone, Inc.*, 524 U.S. 214, 227-28, 118 S.Ct. 1956, 141 L.Ed.2d 222 (1998), and *Morales v. Trans World Airlines, Inc.*, 504 U.S. 374, 385, 112 S.Ct. 2031, 119 L.Ed.2d 157 (1992), simply state that a savings clause cannot be interpreted to defeat the central purpose of a statute's express provisions. Plaintiffs understand the Court's restatement of that principle in *Locke* and *Geier* as creating a universal rule that whenever a savings clause appears in a carefully balanced federal statute, the savings clause must be minimized, no matter the effect on, or the magnitude of, state police powers. No such rule can be derived from those cases.

Locke concerned Washington State rules that imposed "tanker design, equipment, reporting, and operating requirements" aimed at preventing oil spills by interstate carriers. 529 U.S. at 97, 120 S.Ct. 1135. In the federal Oil Pollution Act, Congress included a savings clause preserving state authority to impose "additional liability or requirements" pertaining to "the discharge of oil or other pollution by oil within [a] state." *Id.* at 104-05, 120 S.Ct. 1135. Nevertheless, the Court held that the state law was "in an area where the federal interest has been manifest since the beginning of our Republic," that is, "[t]he authority of Congress to regulate interstate navigation, without embarrassment from intervention of the separate States and resulting difficulties with foreign nations." *Id.* at 99, 120 S.Ct. 1135.

It construed the savings clause to "respect[ ] the established federal-state balance in matters of maritime commerce between the subjects as to which the States retain concurrent powers and those over which the federal authority displaces state control." *Id.* at 107, 120 S.Ct. 1135. It recognized that states have "residual powers" that are appropriately "exercised in concurrence with those of the national government." *Id.* at 109, 120 S.Ct. 1135 (citing *McCulloch v. Maryland*, 17 U.S. 316, 4 Wheat. 316, 4 L.Ed. 579 (1819)). However, since states historically and by recent precedent had little or no "residual powers" over interstate vessel operation, design, or manning, it was "quite unlikely that Congress would use a means so indirect as the savings clauses in [the statute] to upset the settled division of authority." *Id.* at 106, 120 S.Ct. 1135. The Court therefore interpreted the Act to prohibit state regulation of vessel operation, design, or manning, but to permit state laws concerning liability and compensation from oil pollution. *See also*

Geier, 529 U.S. at 868, 120 S.Ct. 1913 (interpreting the literal language of an express preemption provision with a savings clause to "leav[e] adequate room for state tort law to operate," but not to foreclose the finding of a conflict with federal law).

When Congress enacted employer sanctions in IRCA, it acted "within the mainstream of [state] police power regulation." *De Canas*, 424 U.S. at 356, 96 S.Ct. 933. The preemption analysis therefore "proceeds on the assumption that the historic police powers of the States were not . . . superseded by the Federal Act unless that was the clear and manifest purpose of Congress." *Dillingham Constr.*, 519 U.S. at 325, 117 S.Ct. 832. "This presumption against preemption leads us to the principle that express preemption statutory provisions should be given a narrow interpretation." *Air Conditioning & Refrigeration Inst.*, 410 F.3d at 495. Furthermore, its savings clause should be interpreted to "respect[ ] the established federal-state balance . . . between the subjects as to which the States retain concurrent powers and those over which the federal authority displaces state control." *Locke*, 529 U.S. at 107, 120 S.Ct. 1135; *Geier*, 529 U.S. at 868, 120 S.Ct. 1913.

In enacting IRCA, Congress was distinctly aware of the localized impacts of unauthorized immigration. It included provisions to reimburse states for the costs of incarcerating illegal aliens, IRCA § 501, 100 Stat. at 3443, and for the health, welfare, education, and other costs imposed upon states by its legalization of unauthorized aliens then in the country. § 204, 100 Stat. at 3405-11. Unlike IRCA's temporary worker program provisions, which "preempt *any* State or local law regulating admissibility of nonimmigrant workers," § 216(h)(2), 110 Stat. at 3416 (emphasis

added), Congress passed employer sanctions provisions that expressly preempt only some state power and expressly preserve other state powers. It allowed complementary enforcement by states through "licensing and similar laws." 8 U.S.C. § 1324a(h)(2).

If the authorized state and federal sanctions are disproportional in severity, that is because Congress recognized the disproportional harm to core state and federal responsibilities from unauthorized alien labor. The pervasive adverse effects of such employment fall directly on the states. *De Canas*, 424 U.S. at 356-57, 96 S.Ct. 933; *Plyler*, 457 U.S. at 228 n. 3, 102 S.Ct. 2382. *See also* Peter H. Schuck, *Taking Immigration Federalism Seriously*, 2007 U. Chi. Legal F. 57, 79-80 (2007) ("The concentration of the undocumented in a small number of states . . . means that the adverse political and fiscal effects of these concentrations are disproportionate in these states."). Congress conspicuously did not take responsibility for those costs. In light of the disproportionate responsibilities and burdens on the states, Congress could reasonably conclude that states are better equipped than Congress to judge which licenses to sanction, and how much. It left the strong deterrence of licensing sanctions to individual states to implement in their own circumstances.

Thus, Congress expressly reserved to the states the police power described in *De Canas* to act upon the business licenses of those who knowingly employ unauthorized aliens. At the time of *De Canas*, and therefore also today, that power included the power to revoke such a license. Preservation of that state power was itself part of Congress' careful balancing of policy objectives. The structure and purpose of IRCA do not clearly evidence an intent to prevent the

states from independently revoking the business licenses of those who knowingly employ unauthorized aliens.

2. The Act Does Not Impermissibly Regulate in the Field of Immigration

Plaintiffs argue that the Act intrudes into the federal government's plenary power over the field of immigration. *See Hines*, 312 U.S. at 66, 61 S.Ct. 399. Neither A.R.S. § 23-214's requirement that all employers in the State use E-Verify, nor the licensing sanction provisions of section § 23-212 regulate immigration. Like the California law at issue in *De Canas*, the Act does not determine "who should or should not be admitted into the country, and the conditions under which a legal entrant may remain." *De Canas*, 424 U.S. at 355, 96 S.Ct. 933. It "adopt[s] federal standards in imposing . . . sanctions against state employers who knowingly employ aliens who have no federal right to employment within the country." 424 U.S. at 355, 96 S.Ct. 933. "The State may borrow the federal classification" provided "that the classification is reasonably adapted to '*the purposes for which the state desires to use it.*'" *Plyler*, 457 U.S. at 226, 102 S.Ct. 2382 (quoting *Oyama v. California*, 332 U.S. 633, 664-665, 68 S.Ct. 269, 92 L.Ed. 249 (1948)).

The Act adopts the federal government's substantive classification of aliens, which appears in IRCA's definition of "unauthorized alien." 8 U.S.C. 1324a(h)(3); A.R.S. § 23-211(8). Under that definition, all aliens who are not permanent residents or authorized to work by IRCA's legalization and temporary worker provisions already have been classified as "unauthorized aliens." The Act's E-Verify requirement simply designates the procedure for verifying

the existing classification of a person. E-Verify and I-9 are "*employment* verification system[s]" that Congress created to operate within the context of employer sanctions laws. 8 U.S.C. § 1324a(b) (emphasis added); IIRIRA § 401(a), 100 Stat. at 3009-655 (establishing "pilot programs of employment eligibility confirmation"). They do not substantively classify persons as work authorized. Aliens do not gain, lose, or change their status in the United States when they are processed through E-Verify. The Act's E-Verify requirement is therefore a regulation of employment, not immigration.[1]

The sanctions provisions of A.R.S. § 23-212 also regulate only licensing and employment. According to that section, State enforcement officials and State courts must request and rely exclusively on the federal determination of "immigration status or work authorization status" provided by USCIS under 8 U.S.C. § 1373. A.R.S. § 23-212(B), (H). Plaintiffs are mistaken that the only way to verify whether an alien is unauthorized is through a federal deportation hearing. Rather, the federal government allows the states to verify a person's immigration status in relation to work authorization using § 1373. *See* Privacy Act: Verification Information System Records Notice, 72 Fed.Reg. 17,569, 17,571-72 (Apr. 9, 2007) (describing USCIS's use of the same database to process immigration status requests from state agencies and

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[1] If the E-Verify requirement of A.R.S. § 23-214 were invalid, it would be severed and the remainder of the Act upheld. 2007 Ariz. Sess. Laws, Ch. 279, Sec. 5 ("If any provision of this act or its application to any person or circumstance is held invalid, the invalidity does not affect other provisions of this act that can be given effect without the invalid provision or application, and to this end the provisions of this act are severable.").

E-Verify). The Act therefore validly "adopt[s] federal standards in imposing . . . sanctions against state employers." *De Canas*, 424 U.S. at 355, 96 S.Ct. 933.

IV. The Act Does Not Conflict With the Purposes and Objectives of Congress

As noted above, conflict preemption exists when "compliance with both State and federal law is impossible, or when the state law 'stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.'" *Gade*, 505 U.S. at 98, 112 S.Ct. 2374 (citing *Hines v. Davidowitz*, 312 U.S. 52, 67, 61 S.Ct. 399, 85 L.Ed. 581 (1941)). Conflict preemption in this case turns on the second form of conflict, where state law "stands as an obstacle" to federal law. This form of conflict is difficult to define and apply in a judicially prudent manner, for "[w]hat is a sufficient obstacle is a matter of judgment, to be informed by examining the federal statute as a whole and identifying its purpose and intended effects." *Crosby v. Nat'l Foreign Trade Council*, 530 U.S. 363, 373, 120 S.Ct. 2288, 147 L.Ed.2d 352.[2] As Justice

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[2] The Supreme Court has observed that its "pre-emption categories are not 'rigidly distinct'" but that the pre-emptive label chosen can "*carry with it substantive implications for the scope of pre-emption.*" *Gade*, 505 U.S. at 104 n. 2, 112 S.Ct. 2374 (quoting *English*, 496 U.S. at 79 n. 5, 110 S.Ct. 2270 (emphasis added)). *See also Crosby*, 530 U.S. at 372 n. 6, 120 S.Ct. 2288. The occasional conflation of implied field preemption and implied conflict preemption can be especially troubling. *See Gade*, 505 U.S. at 115-16, 112 S.Ct. 2374 (Souter, J., dissenting) (quoting L. Tribe, *American Constitutional Law* 486 (2d ed.1988) (noting that some conflict preemption analysis presents "'a situation similar in practical effect to that of federal occupation of a field'")). Both require analysis of the structure and purpose of a statute to glean Congress' intent, but the substantive implication is different. With field preemption, state police

Kennedy explained in his precedential concurring opinion in *Gade*, where he cast the decisive vote, "A freewheeling judicial inquiry into whether a state statute is in tension with federal objectives would undercut the principle that it is Congress rather than the courts that pre-empts state law." 505 U.S. at 110, 112 S.Ct. 2374 (Kennedy, J., concurring).

That is why the Court has emphasized that conflict preemption arises only when the federal and state laws "actually conflict." *English*, 496 U.S. at 79, 110 S.Ct. 2270. *See also Sprietsma v. Mercury Marine*, 537 U.S. 51, 64, 123 S.Ct. 518, 154 L.Ed.2d 466 (2002); *Freightliner Corp. v. Myrick*, 514 U.S. 280, 287, 115 S.Ct. 1483, 131 L.Ed.2d 385 (1995); *Fla. Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 141, 83 S.Ct. 1210, 10 L.Ed.2d 248 (1963). A mere difference between state and federal law is not conflict. *Paul*, 373 U.S. at 141-46, 83 S.Ct. 1210. The conflict must be "irreconcilable." *Rice v. Norman Williams Co.*, 458 U.S. 654, 659, 102 S.Ct. 3294, 73 L.Ed.2d 1042 (1982). "The teaching of [the Supreme Court's] decisions . . . enjoins seeking out conflicts between state and federal regulation where none clearly exists." *English*, 496 U.S. at 90, 110 S.Ct. 2270. Those "decisions establish that a high threshold must be met if a state law is to be pre-empted for conflicting with the purposes of a federal Act. . . . [Conflict] preemption should be limited to state laws which impose

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powers are relegated to the narrowest of limits. With conflict preemption, states retain their police powers in full, but they cannot use those powers to defeat federal objectives. Conflict preemption analysis, if loosely used, can allow invalidation of state laws based upon concerns that more properly go to field preemption, but without having to say straightly that states are excluded from the entire field.

prohibitions or obligations which are in direct contradiction to Congress' primary objectives, as conveyed with clarity in the federal legislation." *Gade*, 505 U.S. at 110, 112 S.Ct. 2374 (Kennedy, J., concurring).

A. The Act's Licensing Sanctions Procedures Do Not Conflict With the Purposes and Objectives of Congress

The licensing sanctions provisions of § 23-212 carefully track the federal employer sanctions law. The Act does not make employers conform to a stricter standard of conduct than federal law. Both the Act and IRCA prohibit employers from "knowingly" employing an unauthorized alien. *Compare* A.R.S. § 23-212(A) *with* 8 U.S.C. § 1324a(a)(1)(A). The Act also sanctions employers who "intentionally" employ unauthorized aliens, but "intentional" is at least as strict a standard as "knowing." Also like IRCA, the Act's restrictions apply only with respect to those persons who have an "employment relationship" with an employer, so it does not include casual hires. *Compare* A.R.S. § 23-211(3) *with* 8 U.S.C. § 1324a(a). Nor would it include domestic workers because a business license is not needed to hire those persons.

Just like the federal law, the Act contains procedures for weeding out frivolous complaints and provides enforcement officers with discretion. *Compare* A.R.S. § 23-212(C) *with* 8 U.S.C. § 1324a(e). It does not change the degree of inspection that employers must perform on I-9 documents, but rather accords employers who have "complied in good faith" with the I-9 system with the same "affirmative defense" that is provided by federal law. *Compare* A.R.S. § 23-

212(J) *with* 8 U.S.C. § 1324a(a)(3).[3] Also like IRCA, the Act accords employers who verify a new hire's employment eligibility through E-Verify with a "rebuttable presumption" of non-liability. *Compare* A.R.S. § 23-212(I) *with* IIRIRA § 402(b), 110 Stat. at 3009-656.

The Act's adjudicatory procedures do not conflict with federal law merely because a State Superior Court judge and a federal administrative law judge could disagree about the evidence. That possibility arises in every instance of parallel state and federal adjudication. Furthermore, the Act precludes liability for employers whose employees are authorized to work in the United States according to the federal government. The Act requires State investigators to request a federal determination of a person's immigration status. When USCIS determines that an em-

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[3] The Act's replication of the federal affirmative defense of I-9 compliance is not prohibited by 8 U.S.C. § 1324a(b)(4) and (5). These provisions protect persons' privacy rights from employer misuse, and ensure that the government cannot expand use of the I-9 Form to prosecutions other than for employment of unauthorized aliens. Arizona's replication of the federal affirmative defense respects those policies. Subparagraph (4) restricts employers from using copies of identification documents presented by new hires for any purpose other than "complying with the requirements of this subsection." The subsection creates IRCA's employment verification system. The Act allows employers to use I-9 documentation to prove their compliance with the federal employment verification system and then accords employers a rebuttable presumption of innocence. Subparagraph (5) restricts I-9 Forms from being used "for purposes other than for enforcement of [IRCA]." IRCA expressly includes state permission to impose sanctions on employers of unauthorized aliens through "licensing and similar laws." 8 U.S.C. 1324a(h)(2). State use of I-9 Forms to enforce employer licensing sanctions is therefore incorporated into subparagraph (5) by section (h)(2).

ployee is authorized to work, State investigators and courts must accept that determination and the employer cannot be liable. A.R.S. §§ 23-211(8), 23-212(B), (H). *See League of United Latin Am. Citizens v. Wilson*, 908 F.Supp. 755, 770 (C.D.Cal.1995) (upholding the state's ability to "verify immigration status by referring to INS information"). Any burden this imposes on the federal agency is authorized by federal law, which states that USCIS "shall respond" to a request for "verification or status information" "for any purpose authorized by law." 8 U.S.C. § 1373(c).

Plaintiffs argue that because the Act does not contain an explicit prohibition on discrimination, it conflicts with federal law. Arizonans are protected by the prohibitions against discrimination in IRCA, other federal laws, and Arizona law. *See* 8 U.S.C. § 1324b (prohibiting discrimination "against any individual . . . with respect to the hiring . . . or the discharging of the individual from employment"); 42 U.S.C. § 2000e-2 (prohibiting discrimination based on "race, color, religion, sex, or national origin"); A.R.S. § 41-1463(B) (prohibiting employment discrimination based on "race, color, religion, sex, age, disability or national origin"). The State did not have to duplicate these laws by inserting an independent discrimination provision into the Act. It provided that the Act "shall not be construed to require an employer to take any action that the employer believes in good faith would violate federal or state law." A.R.S. § 23-213. There is no actual conflict with the federal goal of discouraging discrimination because the Act prohibits discrimination through deference to State and federal protections.

Plaintiffs also contend that the Act's threat of license revocation upsets the balance that Congress

struck between deterring employment of unauthorized aliens and minimizing discrimination. This false dichotomy amounts to an assertion that the Act defeats Congress' objectives because it achieves better deterrence than IRCA. Congress did not intend that the price of avoiding discrimination would be ineffective deterrence. Instead, it made discrimination illegal, imposed its own sanctions, and affirmed states' power to impose licensing sanctions.

Plaintiffs rely upon two foreign relations cases to argue that a slight shift in the mix of enforcement and discrimination creates a conflict. In *Crosby v. National Foreign Trade Council*, the Supreme Court held that states could not upset "the federal decision about the right degree of pressure to employ" and "undermine[ ] the congressional calibration of force" by "penalizing individuals and conduct that Congress . . . explicitly exempted or excluded from [trade] sanctions," especially "when the President exercises his discretionary authority to impose sanctions under the federal Act." 530 U.S. 363, 378-380, 120 S.Ct. 2288, 147 L.Ed.2d 352 (2000). Likewise, the Supreme Court held in *American Ins. Ass'n v. Garamendi*, that "the state Act [cannot] stand[ ] in the way of the President's diplomatic objectives" by requiring public disclosure of dealings in Europe during the Holocaust that did not have to be disclosed under federal rules, and thereby "use an iron fist where the President has consistently chosen kid gloves." 539 U.S. 396, 427, 123 S.Ct. 2374, 156 L.Ed.2d 376 (2003) (quoting *Crosby*, 530 U.S. at 386, 120 S.Ct. 2288) (alterations omitted).

Unlike the state laws in *Crosby* and *Garamendi*, the Act does not authorize sanctioning employers for acts that Congress has exempted or excluded from

sanction. The sanctioned activity under IRCA and the Act is exactly the same. Furthermore, *Crosby* and *Garamendi* dealt with foreign relations, where the federal interest is dominant and therefore "any concurrent state power that may exist . . . is restricted to the narrowest of limits." *Hines*, 312 U.S. at 68, 61 S.Ct. 399. In contrast, the Act's employer sanctions provisions are employment regulations that are squarely within the police power of the State and that mirror those of IRCA in every significant respect. They do not conflict with the purposes and objectives of Congress. *See Schuck*, *supra*, at 80 ("[I]t is hard to see how state employer sanctions provisions that are carefully drafted to track the federal employer sanctions law can be inconsistent with it—unless we take ineffective enforcement to be the 'real' federal policy from which state law must not deviate.").

B. The Act's Requirement that Employers Use E-Verify Does Not Conflict With the Purposes and Objectives of Congress

Because use of E-Verify is voluntary under federal law, Plaintiffs assert that the State's E-Verify requirement in § 23-214 is preempted. "To discern Congress' intent we examine the explicit statutory language and the structure and purpose of the statute." *Gade*, 505 U.S. at 98, 112 S.Ct. 2374 (quoting *Ingersoll-Rand Co. v. McClendon*, 498 U.S. 133, 138, 111 S.Ct. 478, 112 L.Ed.2d 474 (1990)). When Congress enacted IIRIRA, it declared that "the Attorney General may not require any person or other entity to participate in [E-Verify]." § 402(a), 110 Stat. at 3009-656. This and every other provision in IIRIRA that mentions voluntary participation refers to how E-Verify is to operate in the context of the federal em-

ployer sanctions system. Those provisions strongly evidence Congress' intent not to make E-Verify mandatory at the national level for the national sanctions law. Without more, they do not raise an inference that Congress intended to prevent the states from mandating use of the system in their licensing laws.

Congress wishes E-Verify to be used and revised through experimentation. In IRCA, it authorized the President to implement changes to the I-9 system "to establish a secure system to determine employment eligibility." 8 U.S.C. § 1324a(d)(1). Congress' objective is to create a system that will reliably determine employment eligibility, will be counterfeit-resistant, and will protect privacy rights. § 1324a(d)(2). The system also needs to "have reasonable safeguards against the system's resulting in unlawful discriminatory practices." IIRIRA § 404(d)(4), 110 Stat. at 3009-663. But Congress has not conditioned use of E-Verify on the perfect achievement of these goals. It ordered the Secretary of Homeland Security to make the program accessible nationwide despite its alleged imperfection. Expansion Act § 3(b), 117 Stat. at 1944. Unless and until Congress fails to re-authorize the program by November, 2008,[4] E-Verify is a Congressionally approved tool for employers nationwide.

The Act's E-Verify requirement does not misuse federal resources for an unintended purpose. *See Garrett v. City of Escondido*, 465 F.Supp.2d 1043, 1057 (S.D.Cal.2006) (holding that a local government could not misuse a system for ascertaining benefits

[4] The federal government may terminate an employer's use of E-Verify. There is no reason to think that the government would exclude users except for their own misconduct. Even if a user were terminated or E-Verify ceased to exist, the remainder of the Act could be validly implemented and would survive.

eligibility to verify eligibility for housing). It requires employers to use E-Verify for the precise purpose that Congress intended. It also does not force the federal government to allocate more resources to the program than Congress intended to allocate. The Secretary of Homeland Security must accommodate employer enrollment to the maximum extent that he deems possible given his budgetary and technical resources. *See* IIRIRA § 402(c)(3), 110 Stat. at 3009-657 (the Secretary "shall accept all elections" of employers to participate, but has the power to "reject an election [to participate] . . . if [he] has determined that there are insufficient resources to provide appropriate services."). There is no evidence that the Secretary, or any executive officer for that matter, has balked at the number of E-Verify users that Arizona would add to the system. Indeed, the court can take judicial notice that DHS has placed billboard and radio advertisements in the Phoenix area to encourage greater participation.

The E-Verify requirement does not overburden employers with financial and administrative costs. The overwhelming majority of E-Verify users pay very little in setup and operational costs and find the system easier to use than I-9 alone. Plaintiffs have no evidence that Congress intended to protect employers from state laws that impose such incremental costs. Furthermore, unlike the regulation in *Geier v. American Honda Motor Co.*, 529 U.S. 861, 120 S.Ct. 1913, 146 L.Ed.2d 914 (2000), Congress did not intend to vest employers with individual rights, good against the states' police powers, to choose whether or not to participate in E-Verify. In *Geier*, the Department of Transportation faced public discontent over its mandate that car manufacturers use particular passive restraint systems, so it issued a regulation that

"deliberately sought variety—a mix of several different passive restraint systems." It contemporaneously explained that allowing manufacturers to choose would avoid another "backlash" and "facilitate the development of alternative, cheaper, and safer restraint systems." *Id.* at 876-79, 120 S.Ct. 1913. Here, plaintiffs have no evidence that Congress intended to vest employers with an autonomous choice for the sake of a higher federal goal.

Federal policy encourages the utmost use of E-Verify. The Act effectively increases employer use of the system with no evidence of surpassing logistical limits, and it does so in the context of a licensing sanction law that is within the police power of the states as expressly recognized by IRCA. That Congress has not yet approved a bill mandating use of E-Verify within the federal employer sanctions process evinces Congressional intent regarding national—not state level—use of E-Verify. The Act's requirement that Arizona employers use E-Verify therefore does not actually conflict with Congress' objectives.

V. The Act Provides Employers With Procedural Due Process

Under both the federal and State constitutions, procedural due process requires that a party have an opportunity to be heard "at a meaningful time and in a meaningful manner." *Mathews v. Eldridge*, 424 U.S. 319, 333, 96 S.Ct. 893, 47 L.Ed.2d 18 (1976) (quoting *Armstrong v. Manzo*, 380 U.S. 545, 552, 85 S.Ct. 1187, 14 L.Ed.2d 62 (1965)). Due process requires notice that is reasonably calculated under all of the circumstances to apprise interested parties of the pendency of the action and afford them the opportunity to present their objections. *Mullane v. Cent. Hanover Bank & Trust Co.*, 339 U.S. 306, 314, 70

S.Ct. 652, 94 L.Ed. 865 (1950). It also requires "a fair trial in a fair tribunal." *In re Murchison*, 349 U.S. 133, 136, 75 S.Ct. 623, 99 L.Ed. 942 (1955); *United States v. Superior Court*, 144 Ariz. 265, 280, 697 P.2d 658, 673 (1985). Due process "is flexible and calls for such procedural protections as the particular situation demands." *Mathews*, 424 U.S. at 334, 96 S.Ct. 893 (quoting *Morrissey v. Brewer*, 408 U.S. 471, 481, 92 S.Ct. 2593, 33 L.Ed.2d 484 (1972)).

Plaintiffs contend that the Act on its face violates procedural due process of law by denying employers any fair ascertainment of an essential element of liability. Again, the Act provides the following concerning Superior Court proceedings:

> On determining whether an employee is an unauthorized alien, the court shall consider only the federal government's determination pursuant to 8 United States Code section 1373(c). The federal government's determination creates a rebuttable presumption of the employee's lawful status. The court may take judicial notice of the federal government's determination and may request the federal government to provide automated or testimonial verification pursuant to 8 United States Code section 1373(c).

A.R.S. § 23-212(H). This subsection requires interpretation. On the one hand, the Superior Court "shall consider only" the federal government's determination "whether an employee is an unauthorized alien." But on the other hand, that determination only creates "a rebuttable presumption," meaning that other evidence may be considered. The Superior Court itself may request "automated or testimonial verification" from the federal government.

The parties offer different interpretations of this subsection. Plaintiffs say that the federal determination of the employee's authorization status is conclusive, and thus denies employers any chance to present evidence that the employee is authorized. They give no effect to the second sentence, which subjects the federal determination to rebuttal evidence. Defendants' interpretation gives some effect to both sentences. They interpret the provision to preclude the State from enforcing the Act unless it has received federal verification that the employee is unauthorized, but to allow the Superior Court to consider all evidence on questions of liability. Under either interpretation, an employer can present evidence of the employee's immigration status or work authorization to prove he lacked knowledge or intent to employ an unauthorized alien.

This court need not resolve which interpretation of the statute is correct. For Plaintiffs to prevail in this facial challenge, they must show there is no procedurally adequate application of the statute. They have not done that, as each of the offered meanings of § 23-212(H) entails minimally fair procedure, or better.

A. Defendants' Interpretation Meets Due Process

Defendants' interpretation of § 23-212(H) easily meets due process requirements. No employer may be sanctioned without a full evidentiary hearing in the Superior Court of Arizona. A.R.S. § 23-212(E); Ariz. R. Civ. P. 65.2. The State has the burden to prove that the employer knowingly or intentionally employed an unauthorized alien. The Superior Court has full evidence-taking, fact-finding, and discretionary authority on all issues of liability; it simply can-

not find an employee unauthorized absent a federal determination to that effect under 8 U.S.C. § 1373(c).

Under Defendants' interpretation, subsection (H) parallels subsection (B), which prohibits enforcing officers from "independently making a final determination on whether an alien is authorized to work in the United States" apart from the government's § 1373(c) response. Subsections (B) and (H) harmonize the Act with federal law and may be meant to protect workers from being the direct subject of investigation and enforcement. But where the employer's liability is at issue, the § 1373(c) determination creates only a rebuttable presumption—meaning that the employer may present any evidence to rebut the presumption that the employee is unauthorized or prove that it lacked knowledge of the employee's unauthorized status. Because the State cannot conclude that the employee is unauthorized without the federal determination, additional evidence of the employee's status can only exonerate the employer from liability.

This interpretation provides the employer with a meaningful hearing on the subject of liability and avoids the constitutional issues posed by Plaintiffs. *See Mejak v. Granville*, 212 Ariz. 555, 557, 136 P.3d 874, 876 (2006) ("[I]n interpreting a statute, this Court must . . . give effect to every provision in the statute . . . [and] interpret the statute so that no provision is rendered meaningless, insignificant, or void."); *Business Realty v. Maricopa County*, 181 Ariz. 551, 559, 892 P.2d 1340, 1349 (1995) ("We interpret statutes to uphold their constitutionality, if that is possible. As a corollary, we strive to give statutes meanings that avoid serious constitutional issues. We reach those only when absolutely necessary.").

B. Plaintiffs Have Not Shown That Their Interpretation Fails Due Process

Even if the government's § 1373(c) response that the employee is unauthorized is conclusive upon the Superior Court, as Plaintiffs contend, employers still have doubly fair and adequate procedure embedded in the federal determination itself. That fair procedure is found in the E-Verify process, which Arizona employers must use, and again in the § 1373(c) response that the county attorney and the Superior Court may request from the government.

1. The E-Verify process itself is fair, prompt, interactive, and adequate. It provides opportunity for the employee to be heard. After an initial report to the employer that the employee is not authorized to work, USCIS must make available a "secondary verification process to confirm the validity of information provided." IIRIRA § 404(c), 110 Stat. at 3009-663. USCIS records the result of both its initial response and its secondary verification process in the Verification Information System database, and then issues a final determination. (Facts, Doc. # 152, Ex. 52, Findings of the Web Basic Pilot Evaluation 11-15, Sept. 2007.) The employer is the beneficiary of that process, with the authorized employee having his federal records cleared up unless he abandons the effort. The employer is protected by his ability to terminate an employee who declines to clear up his records through the interactive process of E-Verify. An employee who proceeds to a final non-confirmation under E-Verify may even have federal judicial review of that final determination. *See* 5 U.S.C. § 702. When the State later submits its § 1373(c) request and USCIS checks its verification database, the data will reflect the outcome of the secondary process

and the response given to the State will be a final determination of employment status.

With employers on notice that they must avail themselves of this prior adequate procedure, due process does not require a second procedure (though § 23-212(H) does give them a second procedure under 8 U.S.C. § 1373(c)). Due process of law does not prevent legislation from requiring recourse to prior adequate proceedings, the result of which may not be questioned in a later proceeding, such as an enforcement proceeding. *Natural Resources Defense Council, Inc. v. U.S. EPA*, 673 F.2d 400, 406-07 (D.C.Cir.1982) (due process concerns arising from preclusion of review have little weight where, in fact, the regulated parties were on full notice of the need to challenge regulations within a specified time). The Act builds on this due process principle and thus accords employers and workers fair and adequate process. Obligatory deference to the procedurally adequate and mandatory federal determination process is not unconstitutional.

Of course, the procedural adequacy of E-Verify could count as a substitute for original Superior Court evidence and fact-finding concerning the employee's unauthorized status only if the employer was on notice to use E-Verify when hiring the worker. That is not the case for workers who were hired before E-Verify became mandatory in Arizona on January 1, 2008. There is debate over whether the Act permits enforcement proceedings concerning employees hired before January 1, 2008. Though at least some county attorneys say the Act does apply to previous hires, no county attorney has expressed any intention of enforcing with respect to previous hires. (Trial Tr. 109.) The cost-of-compliance injury upon

which the court has found standing against the county attorneys would not apply to enforcement for previous hires since the Act does not purport to require E-Verify confirmation for them. In any event, the court need not decide whether the Act permits enforcement for old hires, which would have to await an actual case with those facts. It is enough that the statute is capable of some constitutional application to defeat this facial challenge.

2. Employers who have not confirmed under E-Verify have one or two more chances for secondary verification of the employee's status, thus affording adequate procedure to the employer. The first may occur when the State submits its request under § 1373(c). Second, the Superior Court may "request the federal government to provide automated or testimonial verification pursuant to [§ 1373]," A.R.S. § 23-212(H), which is another chance to submit evidence of the employee's work authorization and have the government act upon it. Under federal law, USCIS has an affirmative duty to respond to such verification requests. 8 U.S.C. § 1373(c).

USCIS has not clearly defined many of the procedures that it follows when responding to state § 1373(c) inquiries. It might perform secondary verifications of employee documentation at the behest of State investigators and the Superior Court. The number of such requests will be insignificant compared to the number of E-Verify requests, so the agency easily could do so. Arguable legal authority also exists for secondary checks through § 1373 requests. IIRIRA §§ 403(a)(4), 404(c), 642, 110 Stat. 3009-660, 661, 663, 707 (requiring the federal government to "provid[e] the requested verification or status information" to the states in the same statute

that created E-Verify and mandated a secondary verification process) (emphasis added). If USCIS performs secondary verification of employee documentation, then its § 1373(c) process will be the same as the E-Verify process.

Neither the federal government nor the flexible principles of due process explained in *Mathews*, 424 U.S. at 334, 96 S.Ct. 893, require that the employer be allowed to interact directly with the federal government agency in its verifying process. Even under E-Verify, Congress gave the employee access to the secondary verification process, not the employer, though the employer must inform and assist the employee. IIRIRA § 403(a)(4), 100 Stat. 3009-660 to 661. (*See also* Facts, Doc. # 148, Ex. 7, E-Verify Memorandum of Understanding, Art. II § C ¶ 9, Art. III.)

The Act provides employers opportunities to be heard through the federal processes themselves. They may be heard indirectly through their employees' dialog with the government in E-Verify, and directly by presenting evidence of an employee's immigration status, perhaps to the county attorney and certainly to the Superior Court. Both can pass it on to the federal government for secondary review of work authorization and a further determination under § 1373(c). Plaintiffs' evidence does not prove that USCIS will refuse to consider such evidence and conduct secondary review of the employee's work authorization. Therefore, even if the government's § 1373(c) response is conclusive upon the Superior Court, Plaintiffs fall short of showing that the § 1373(c) process itself will lack adequacy and fairness. That is enough to defeat this facial challenge.

The facial constitutionality of this process is not defeated by hypothetical situations that may result in

no secondary verification taking place. Such abstraction is not the business of a facial challenge. Plaintiffs may raise those as-applied challenges if and when such procedural failures occur.

C. The Superior Court Process Is Fair and Adequate

Plaintiffs' other procedural due process challenges have no merit. The other Superior Court processes are subject to all the procedural protections of the Arizona Rules of Civil Procedure. Since the Superior Court has full evidence-taking, fact-finding, and discretionary authority on these issues, with the burden of proof on the State, there can be no due process right to participate in the enforcing officer's investigation and preparation of his case (though civil enforcement proceedings are rarely brought without first contacting the defendant).

Nowhere in the Act does it say that county attorneys must prosecute all non-frivolous cases, or ones motivated by discrimination. Plaintiffs' other procedural fears are improbable. If they ever arose in a real case, they could be decided, but there are no real facts here and the Act is not deficient on its face.

VI. Other Contentions

The Business Group Plaintiffs' complaint (Doc. # 1) also alleges that the Act violates the Commerce Clause of the U.S. Constitution, the separation of powers doctrine of the Arizona Constitution, and the Fourth Amendment of the U.S. Constitution. They have stipulated to withdraw the separation of powers and Fourth Amendment claims. (Doc. # 134).

With respect to the Commerce Clause argument, the Act does not regulate employees completely out-

side of the State. The Act defines "employee" as "[a]ny person who performs employment services for an employer" who is licensed to do business in the State. A.R.S. § 23-211(3). However, enforcement actions must be filed "against the employer by the county attorney *in the county where the unauthorized alien is employed*." § 23-212(D) (emphasis added). This precludes the extra-territorial application upon which the Business Group Plaintiffs ground their Commerce Clause argument. It also precludes conflict with the laws of another state where an employee works.

IT IS THEREFORE ORDERED that the Clerk enter judgment dismissing these actions as against Defendant Arizona Attorney General Terry Goddard without prejudice for lack of subject matter jurisdiction, there being no justiciable case or controversy against him.

IT IS FURTHER ORDERED as to all other Defendants that the Clerk enter judgment against Plaintiffs and in favor of those Defendants and that Plaintiffs take nothing. The Clerk shall terminate this action.

IT IS FURTHER ORDERED that the motions for preliminary injunction (Doc. # 4 in No. CV 07-2496 and Doc. # 3 in No. CV 07-2518) are denied.

APPENDIX D

UNITED STATES DISTRICT COURT,
D. ARIZONA.

Nos. CV07-1355-PHX-NVW,
CV07-1684-PHX-NVW.

ARIZONA CONTRACTORS ASSOCIATION, INC., AN ARIZONA NONPROFIT CORPORATION; ARIZONA EMPLOYERS FOR IMMIGRATION REFORM, INC., AN ARIZONA NON-PROFIT CORPORATION; CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA, A WASHINGTON D.C. NON-PROFIT CORPORATION; ARIZONA CHAMBER OF COMMERCE, AN ARIZONA NON-PROFIT CORPORATION; ARIZONA HISPANIC CHAMBER OF COMMERCE, INC., AN ARIZONA NON-PROFIT CORPORATION; ARIZONA FARM BUREAU FEDERATION, AN ARIZONA NON-PROFIT CORPORATION; ARIZONA RESTAURANT AND HOSPITALITY ASSOCIATION, AN ARIZONA NON-PROFIT CORPORATION; ASSOCIATED MINORITY CONTRACTORS OF AMERICA, AN ARIZONA NON-PROFIT LIMITED LIABILITY COMPANY; ARIZONA ROOFING CONTRACTORS ASSOCIATION, AN ARIZONA NON-PROFIT CORPORATION; NATIONAL ROOFING CONTRACTORS' ASSOCIATION, AN ILLINOIS NOT-FOR-PROFIT CORPORATION; WAKE UP ARIZONA! INC., AN ARIZONA NON-PROFIT CORPORATION; AND ARIZONA LANDSCAPE CONTRACTORS ASSOCIATION, INC., AN ARIZONA NON-PROFIT CORPORATION,

Plaintiffs,

v.

JANET NAPOLITANO, GOVERNOR OF THE STATE OF ARIZONA; TERRY GODDARD, ATTORNEY GENERAL OF THE STATE OF ARIZONA,

Defendants.

CHICANOS POR LA CAUSA, INC.; AND SOMOS AMERICA,

Plaintiffs,

v.

JANET NAPOLITANO, IN HER OFFICIAL CAPACITY AS GOVERNOR OF THE STATE OF ARIZONA; TERRY GODDARD, IN HIS OFFICIAL CAPACITY AS ATTORNEY GENERAL OF THE STATE OF ARIZONA; AND GALE GARRIOTT, IN HIS OFFICIAL CAPACITY AS THE DIRECTOR OF THE ARIZONA DEPARTMENT OF REVENUE,

Defendants.

Dec. 7, 2007.
As Amended Dec. 10, 2007.

FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER

NEIL V. WAKE, District Judge.

Plaintiffs challenge the Legal Arizona Workers Act, A.R.S. §§ 23-211 through 214, enacted July 2, 2007, and effective January 1, 2008. 2007 Ariz. Sess. Laws, Ch. 279. The Act provides the superior courts of Arizona with the power to suspend or revoke the business licenses of employers who intentionally or knowingly employ an unauthorized alien. By agreement of the parties, the two cases were consolidated and accelerated for trial on November 14, 2007, on stipulated facts and written evidence. Defendants' motions

to dismiss were deferred to the trial. This order states findings of fact and conclusions of law pursuant to Rule 52(a), Fed.R.Civ.P.

There is no justiciable case or controversy against these Defendants. Plaintiffs do not intentionally or knowingly employ any unauthorized aliens, and they have no plans to. They bear no imminent threat of enforcement. Only county attorneys are authorized to enforce the Act. These Defendants—the Governor, the Attorney General, and the Director of the Department of Revenue—have only investigatory or informational authority under the Act, and they have not made even empty threats to prosecute anyone.

Verifying the employment eligibility of new hires through the federal E-Verify program has some costs for employers. The federal government makes E-Verify available, but the State mandates its use. Although the State's mandate to use E-Verify has no direct enforcement or enforcer, the Act indirectly forces employers to obtain powerful evidence of workers' authorization from the federal government. The plausible consequence for refusing to use E-Verify may be that employers also cannot prove their good faith compliance with the I-9 process because the E-Verify system would have exposed the employee's lack of authorization. An employer who foregoes the mandated E-Verify evidence may be left with little or no evidence that matters. For this reason, participation in E-Verify is not a free choice even though there is only a general threat of enforcement proceedings, and even though Plaintiffs' failure to participate in E-Verify does not increase appreciably the likelihood of enforcement proceedings against them. The Act forces them to enroll in E-Verify because if they do

not enroll now they face near certain and intolerable harm in the event of a future enforcement proceeding.

Yet the court cannot redress that internal coercion with a judgment against these Defendants. The State officers do not cause the intolerable risk that Plaintiffs may have no defense if they forego the E-Verify evidence. That risk finds its sting only at the hands of a county attorney, the only official empowered to bring a future enforcement proceeding.

This action must be dismissed without prejudice for lack of subject matter jurisdiction, there being no justiciable case or controversy against the Defendants.

I. Employer Sanctions in the Federal Government's Immigration Reform and Control Act and E-Verify

A. Summary of the IRCA

Federal law first created sanctions for employers of unauthorized aliens in the Immigration Reform and Control Act (IRCA), enacted in 1986. Before then, federal law did not displace State authority to enact and enforce sanctions against employers of unauthorized aliens except to the extent the State law conflicted with federal enactments. *De Canas v. Bica*, 424 U.S. 351, 96 S.Ct. 933, 47 L.Ed.2d 43 (1976). The central provisions of IRCA are codified at 8 U.S.C. §§ 1324a through 1324c. With certain exclusions, it is unlawful to hire or continue to employ a person known to be an unauthorized alien. 8 U.S.C. § 1324a(a)(1)(A) and (a)(2). An unauthorized alien is one who is not "either (a) an alien lawfully admitted for permanent residence, or (B) authorized to be so employed by this Act [IRCA] or by the Attorney General." § 1324a(h)(3).

The IRCA also requires employees and employers to comply with a paper-based employment eligibility verification system set out in 8 U.S.C. § 1324a(b), known as the I9 system. Employees must swear to their authority to work, and employers must examine certain wide classes of identification documents recorded on Form I-9. An identification document is sufficient if it "reasonably appears on its face to be genuine." § 1324a(b)(1)(A). Employers must keep records of compliance with the I-9 system. § 1324a(b)(1)(3). An employer's good faith attempt to comply suffices notwithstanding a technical or procedural failure unless the employer has engaged in a pattern or practice of violations or fails to correct an error after the government points it out. § 1324a(b)(6).

The IRCA entrusts its enforcement to the Attorney General with hearings before specially selected administrative law judges, subject to federal judicial review. § 1324a(e). The government must prove by a preponderance of the evidence that the employer knowingly hired or retained an unauthorized alien, but it is "an affirmative defense" that the employer "complied in good faith" with the I-9 system mandated by § 1324a(b), § 1324a(a)(3) and 1324a(e)(3)(C). Remedies include cease and desist orders and civil fines from $250 to $2,000 for a first order, $2,000 to $5,000 for a second order, and $3,000 to $10,000 for a further order. Other remedial action may be ordered. § 1324a(e)(4). The Attorney General may seek enforcement of orders in a federal district court. § 1324a(e)(9). For a pattern or practice of violations a criminal fine up to $3,000 and imprisonment up to six months can be imposed. The Attorney General may also seek civil injunctive relief. § 1324a(f).

Central to Plaintiffs' challenges in this case is the preemption clause of 8 U.S.C. § 1324a(h)(2), which provides, "The provisions of this section [8 U.S.C. § 1324a] preempt any State or local law imposing civil or criminal sanctions (other than through licensing or similar laws) upon those who employ, or recruit or refer for a fee for employment, unauthorized aliens."

Other sections prohibit document fraud and employment discrimination based on national origin or legal immigration status, with enforcement procedures, tribunals, and remedies. 8 U.S.C. § 1324b and 1324c. There are other provisions that need not be reviewed to understand the justiciability issues in this case.

B. Failure of the I-9 System

As the Congressional Research Service Report to Congress dated April 20, 2007, concludes, "There is general agreement that the I-9 process has been undermined by fraud—both document fraud, in which employees present counterfeit or invalid documents, and identity fraud, in which employees present valid documents issued to other individuals." (Joint Statement of Facts, Doc. # 72 (Facts), Ex. 15 at 3.) The result of the failure of the I-9 system and other causes is that "an estimated 7.2 million unauthorized workers were in the U.S. civilian labor force in March 2005, representing about 5% of the labor force." (*Id.* at 1.) The unauthorized resident alien population "has grown at an average annual rate of more than 500,000 per year." (*Id.*) As the director of immigration policy for Plaintiff U.S. Chamber of Commerce testified before Congress last June, "Current immigration laws are severely flawed and have failed to

curb the flow of undocumented workers into the U.S." (Facts, Ex 22J at 3.)

C. E-Verify

Building on the I-9 system, the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub.L. No. 104-208, §§ 401-404, 110 Stat. 3009, 3009-655 to 3009-666, directed the Attorney General to conduct three pilot programs for employment eligibility confirmation, one of which is still in operation, formerly known as the Basic Pilot and now known as E-Verify. (Facts, Ex. 8 at 1.) Originally limited to five states, it was expanded nationwide in 2004. Federal law does not mandate E-Verify participation except for some government contractors and violators of immigration laws. (Facts, Ex. 9 at 1.) E-Verify is an Internet-based system that electronically compares information submitted by the employee on Form I-9 with the records maintained by the Social Security Administration (SSA) and the Department of Homeland Security (DHS).

Employers participating in E-Verify sign a Memorandum of Understanding (MOU) with SSA and DHS that sets out terms of use. (Facts, Ex. 7.) After hiring a new employee the employer queries E-Verify, which then compares the information to SSA's primary database. If the information matches, the employer is immediately notified that the employee is verified. If the submitted information is inconsistent with SSA data, the employer is notified of a tentative nonconfirmation within three federal work days, but usually immediately. (Facts, Ex. 7, Art. II § A ¶ 4; Ex. 11 at 2.)

If the submitted information and SSA data are consistent for noncitizens but the SSA database does not permit confirmation of work-authorization, the

submitted information is next compared to the DHS's data, usually at the U.S. Citizenship and Immigration Services (CIS). If the CIS automated match is adequate to establish work-authorization, the employee is verified immediately. If not, a CIS field office records expert checks other DHS information. If the field worker is able to verify work-authorization, the employer is typically notified within one day of case submission. (Facts, Ex. 11 at 2.)

When neither the automated SSA and DHS checks nor the check by the immigration status verifier can confirm an employee's work status, the system issues the employer a tentative nonconfirmation. The employer must notify the employee, who has eight days to contest the finding by contacting SSA or CIS to resolve any inaccuracies in their records. (Facts, Ex. 13, App. C at C-2.) The MOU gives detailed steps to assist the employee in contesting a tentative nonconfirmation. (Facts, Ex. 7, Art. III § B.) The contesting process is normally limited to ten federal work days, but may be extended. No adverse action may be taken against the employee in the meantime. Employees who do not contest the tentative nonconfirmation receive a final nonconfirmation finding. If contested, CIS informs the employer of the employee's final work-authorization status. After ten days, employers must either immediately terminate employment or notify DHS of the continued employment of workers who have not successfully contested the tentative nonconfirmation and who E-Verify has found not to be work-authorized. (Facts Ex. 7, Art. II § C ¶ 6; Ex. 10 at 7; Ex. 11 at 2-3.)

About 92% of queries confirm work authorization within seconds. About 7% cannot be confirmed immediately by SSA, and about 1% cannot be con-

firmed immediately by DHS. Resolving the nonconfirmations can take several days, or in a few cases even weeks. (Facts, Ex. 22B at 3.)

Other provisions are aimed at protecting privacy and preventing misuse of the E-Verify system. Participating employers must verify all new hires, but only new hires. The employer agrees in the MOU to grant SSA and DHS access to the employer's E-Verify and employment related documents and to its employees for interviews. "Failure to comply with the terms of this paragraph may lead DHS to terminate the Employer's access to E-Verify." (Facts, Ex. 7, Art. II § C ¶ 15.)

Employers are still subject to the Form I-9 obligations, but some are modified by the E-Verify MOU. The acceptable employee identifying documents are narrowed. The employer is subject to a civil money penalty for failure to notify DHS if it continues to employ an individual after receiving a final nonconfirmation. Of particular importance to this case, "a rebuttable presumption is established that the Employer has not violated [8 U.S.C. § 1324a(a)(1)(A), the prohibition of hiring an unauthorized alien] . . . if it obtains confirmation of the identity and employment eligibility of the individual in compliance with the terms and conditions of E-Verify." Conversely, "the Employer is subject to a rebuttable presumption that it has knowingly employed an unauthorized alien in violation of [8 U.S.C. § 1324a(a)(1)(A)] if the Employer continues to employ any employee after receiving a final nonconfirmation." No one "participating in E-Verify is civilly or criminally liable under any law for any action taken in good faith on information provided through the confirmation system." (*Id.* at Art. II § C ¶ 6.)

According to the U.S. Citizenship and Immigration Services, "E-Verify is currently the best means available for employers to verify electronically the employment eligibility of their newly hired employees. E-Verify virtually eliminates Social Security mismatch letters, improves the accuracy of wage and tax reporting, protects jobs for authorized U.S. workers, and helps U.S. employers maintain a legal workforce." (Facts, Ex. 9 at 1.) A 2002 survey and evaluation observed that "an overwhelming majority of employers participating found [E-Verify] to be an effective and reliable tool for employment verification." (Facts, Ex. 10 at v.) After the program was implemented, 60% of employers found it "not at all burdensome." Ninety-three percent reported that it was easier than the I-9 process, and 92% reported that it did not overburden their staff. (*Id.* at 33.) In a 2006 SSA survey of fifty users with a large volume of verification requests, 100% rated the program "Excellent," "Very Good," or "Good." (Facts, Ex. 13 at 4.) A majority of employers in the 2002 survey spent under $500 for E-Verify start-up costs and under $500 annually for operating costs. Annual operating costs averaged $1,800, with about 85% spending less than $3,500. (Facts, Ex. 10 at vi., 34.)

The same study found that less than one-tenth of 1% of employment verification attempts resulted in a finding of "unauthorized." It estimated that 10% of all cases submitted were unauthorized workers, but very few of them contested the tentative nonconfirmation. (*Id.* at vi.) E-Verify is not fraud proof and was not designed to detect identity fraud. (Facts, Ex. 15 at 6.) However, a piloting photograph screening tool, whereby an employer can more easily identify identity fraud, has been extended to all users. (Facts, Ex. 22B at 3-4.)

II. The Legal Arizona Workers Act

The Legal Arizona Workers Act ("the Act"), A.R.S. § 23-211 through 23-214 (Supp.2007), is a conscious State attempt to impose sanctions by "licensing and similar laws" upon those who employ unauthorized aliens, as expressly permitted in 8 U.S.C. § 1324a(h)(2). A principal issue in this case is whether the Act comes within that safe harbor or spills over to the other "civil or criminal sanctions" forbidden to States.

The Act builds on the federal statutory prohibitions and the I-9 system, but avoids making determinations of alien status or work authorization separate from those made by the federal government. It provides, "An employer shall not intentionally employ an unauthorized alien or knowingly employ an unauthorized alien," incorporating the federal definitions of "knowingly employ" and "unauthorized alien." A.R.S. §§ 23-212(A), 23-211(6) and (8). The federal government provides its determination of "the work authorization of the alleged unauthorized alien" to State officials and the State court pursuant to 8 U.S.C. § 1373(c). That determination is binding, though the State court may request verification. A.R.S. § 23-212(B) and (H). The Act replicates the federal "affirmative defense" that the employer "complied in good faith" with the I-9 system. A.R.S. § 23-212(J). However, as noted above, participation in E-Verify very much affects the federal "affirmative defense" that the employer "complied in good faith" with the I-9 system.

The Act also replicates the federal rebuttable presumption of compliance for employers who have verified the employment authorization of their employees through E-Verify. A.R.S. § 23-212(I). The Act goes

further than federal law, however, and requires employers to verify the eligibility of new hires through the E-Verify program after December 31, 2007. A.R.S. § 23-214.

The sanctions for violating A.R.S. § 23-212(A) vary. For a first adjudicated knowing violation during a three-year period, the employer is ordered to terminate the employment of all unauthorized aliens, must file quarterly reports of new hires for a three-year probation period, and is ordered to file an affidavit within three days that it has terminated all unauthorized aliens and will not intentionally or knowingly employ an unauthorized alien. If the employer does not file the affidavit on time, its business licenses are suspended until it does. Even if the affidavit is filed on time, the court may suspend the business licenses up to ten days after considering various factors. A.R.S. § 23-212(F)(1).

For a first adjudicated intentional violation during a five-year period, the sanctions are the same except that the probation and reporting period is five years and suspension of business licenses is mandatory for a minimum of ten days. A.R.S. § 23-212(F)(2).

For a second knowing or intentional violation during the period of probation, business licenses are permanently revoked. A.R.S. § 23-212(F)(3).

"License" means any state or local "authorization that is required by law and that is issued . . . for the purposes of operating a business in this state." A.R.S. § 23-211(7)(a). It includes articles of incorporation, a certificate of partnership, a foreign corporation registration, and a transaction privilege (sales tax) license, but not a professional license. A.R.S. §§ 23-211(7)(b) and (c). Obviously, both the punishment and the deterrence are meant to be stiff.

The Act authorizes only county attorneys to bring proceedings under the Act. A.R.S. §§ 23-212(C)(3), 23-212(D). Both county attorneys and the Attorney General may receive and shall investigate complaints of violation. Upon concluding that a complaint is not frivolous, the investigating officer shall notify federal immigration authorities and the local law enforcement agency of the unauthorized alien, and the Attorney General "shall notify the appropriate county attorney to bring an action" if the complaint was filed with the Attorney General. A.R.S. § 23-212(C). The Attorney General shall also maintain copies of court orders of enforcement. A.R.S. § 23-212(G). The Act required and the Director of the Department of Revenue did send a notice by October 1, 2007, to all employers required to withhold income taxes informing them of the terms of the Act. 2007 Ariz. Sess. Laws, Ch. 279, § 3. (Facts, Ex. 6.)

III. The Litigation and the Parties

The Plaintiffs in No. CV 07-1355 are twelve nonprofit corporations that are associations of members and serve as public policy advocates for their members. They are referred to as the "Business-Group Plaintiffs." Three are chambers of commerce reflecting wide business interests, two are business associations interested in immigration policy, and seven are trade associations in specific industries. Ten are incorporated in Arizona and have their principal place of business in Arizona. Nine have employees in Arizona. Wake Up Arizona!, the U.S. Chamber of Commerce, and the National Roofing Contractors Association have no Arizona employees, but they allege that some of their members have employees in Arizona. The latter two are not incorporated in Arizona, and there is no evidence they have any busi-

ness license that could be sanctioned under the Legal Arizona Workers Act, but they allege that some of their members do have Arizona business licenses. (Facts, ¶¶ 1-6.)

Plaintiff Chicanos Por La Causa, Inc., in No. CV 07-1684 (now consolidated with No. CV 07-1355) is an Arizona non-profit corporation with 600 Arizona employees. It is Arizona's largest community development corporation. Plaintiff Somos America, a coalition of diverse groups for comprehensive immigration reform, presents no allegation or evidence that it or any of its members have Arizona employees or are subject to the Act. It will be dismissed for lack of standing and will be omitted from the balance of the discussion in this order. (Facts, Ex. 23.¶¶ 1-8.)

The Act will govern the remaining Plaintiffs and/or some of their members and will require them to use E-Verify to ascertain the employment eligibility of new employees. They will need to allocate employee time to install and learn software, complete a tutorial, sign the MOU, and submit information regarding their new employees. The cost will be at least several hundred to several thousand dollars per year.

All Plaintiffs contend that the Act violates the IRCA's preemption of "any State or local law imposing civil or criminal sanctions (other than through licensing or similar laws) upon those who employ, or recruit or refer for a fee for employment, unauthorized aliens." 8 U.S.C. § 1324a(h)(2). They further assert that the differences between the Act and the IRCA conflict with federal law. They also argue that the voluntariness of E-Verify under federal law prohibits the State from requiring Arizona employers to participate as a part of the Arizona license sanction regulation.

The Business-Group Plaintiffs contend that the Act also violates procedural and substantive due process of law, the federal Commerce Clause, Arizona separation of powers, and the Fourth Amendment guarantee against unreasonable search and seizure.

The Defendants are the Governor and the Attorney General of the State of Arizona, and in the case of Chicanos Por La Causa, also the Director of the Department of Revenue.

All Plaintiffs claim injury and standing based on the expense of participating in E-Verify and seek declaratory relief and an injunction against enforcement of the Act. The Business-Group Plaintiffs also claim injury and standing from threat of enforcement of the Act and from forced waiver of their Fourth Amendment rights by signing the E-Verify MOU.

IV. The Business-Group Plaintiffs Have No Standing to Challenge the Act Based on a Threat of Prosecution or Loss of Fourth Amendment Rights

Article III of the Constitution limits the judicial power of federal courts to "cases" and "controversies." *Flast v. Cohen*, 392 U.S. 83, 94, 88 S.Ct. 1942, 20 L.Ed.2d 947 (1968). Federal courts must maintain their proper role as arbiters of adversarial disputes and not stray into areas committed to other branches of government. *Id.* "No principle is more fundamental to the judiciary's proper role in our system of government than the constitutional limitation of federal-court jurisdiction to actual cases or controversies." *Simon v. E. Ky. Welfare Rights Org.*, 426 U.S. 26, 37, 96 S.Ct. 1917, 48 L.Ed.2d 450 (1976) (citing *Flast*, 392 U.S. at 95, 88 S.Ct. 1942). For a case or controversy to exist under Article III, a plaintiff must have standing to assert his legal claims, those claims must

be ripe for review, and the harm must be redressable against the defendants. *Renne v. Geary*, 501 U.S. 312, 320, 111 S.Ct. 2331, 115 L.Ed.2d 288 (1991).

"[T]he standing question in its Art. III aspect 'is whether the plaintiff has alleged such a personal stake in the outcome of the controversy as to warrant his invocation of federal-court jurisdiction and to justify exercise of the court's remedial powers on his behalf.'" *Simon*, 426 U.S. at 38, 96 S.Ct. 1917 (quoting *Warth v. Seldin*, 422 U.S. 490, 498-99, 95 S.Ct. 2197, 45 L.Ed.2d 343 (1975)). To have standing a plaintiff must have suffered an "injury in fact." Such an injury is one that is concrete, particularized, actual, and imminent, not conjectural or hypothetical. *San Diego County Gun Rights Comm. v. Reno*, 98 F.3d 1121, 1126 (9th Cir.1996) (citing *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560, 112 S.Ct. 2130, 119 L.Ed.2d 351 (1992)). The plaintiff must also establish "a causal connection between the injury and the conduct complained of," and it must be likely, not merely speculative, that the injury will be redressed by a favorable decision. *Id.*

To the extent that the Business-Group Plaintiffs assert standing on behalf of their members, they must show that 1) "their members would otherwise have standing to sue in their own right;" 2) "the interests that they seek to protect are germane to the purposes of their organizations;" and 3) "neither the claims asserted nor the relief requested requires the participation of individual members in the lawsuit." *San Diego County Gun Rights Comm.*, 98 F.3d at 1130-31 (citing *Hunt v. Wash. State Apple Adver. Comm'n*, 432 U.S. 333, 343, 97 S.Ct. 2434, 53 L.Ed.2d 383 (1977)). Defendants do not challenge the Business-Group Plaintiffs' associational standing.

A. There Is No Imminent Threat of License Proceedings Against the Business-Group Plaintiffs

The Business-Group Plaintiffs have standing if they can prove a "genuine threat of imminent prosecution" by the Defendants. *San Diego County Gun Rights Comm.*, 98 F.3d at 1126 (emphasis omitted). The credibility of a threat of prosecution turns on: 1) "whether the plaintiffs have articulated a 'concrete plan' to violate the law in question," 2) "whether the prosecuting authorities have communicated a specific warning or threat to initiate proceedings," and 3) "the history of past prosecution or enforcement under the statute." *Thomas v. Anchorage Equal Rights Comm'n*, 220 F.3d 1134, 1139 (9th Cir.2000) (en banc) (citation omitted).

There is no threat of enforcement proceedings against the Business-Group Plaintiffs by the Defendants or anyone else. The Business-Group Plaintiffs do not knowingly employ or plan to employ any unauthorized alien. They rely solely on a press release by the Maricopa County Attorney that announces his intent to enforce the Act through a partnership with the Sheriff's Office. (Facts, Ex. 19.) That is a message to the entire county, not to these Plaintiffs. "[A] general threat of prosecution is not enough to confer standing." *San Diego County Gun Rights Comm.*, 98 F.3d at 1127. Plaintiffs have presented no evidence of a specific threat directed at them or any of their members. *Thomas*, 220 F.3d at 1140. They therefore lack standing on this basis.

B. Signing the E-Verify Memorandum of Understanding Gives No Standing Because It Does Not Waive Fourth Amendment Rights

The Business-Group Plaintiffs also claim injury from forced waiver of their Fourth Amendment right

to be free of warrantless federal searches of their employment records. When they sign the MOU to participate in E-Verify, they must agree to give the federal government access to employment records and employees for interviews. If they later refuse access, DHS may terminate their use of E-Verify, leaving the employer not in compliance with State law. Several threads run through this argument, but none ties to a real injury.

Assuming for now that employers have privacy interests in the specified documents and interviews sufficient to invoke the protections of the Fourth Amendment, the MOU does not authorize warrantless searches. *See Midwest Growers Coop. Corp. v. Kirkemo*, 533 F.2d 455, 463 (9th Cir.1976) (holding that a statute that allowed an agency "access to and authority . . . to inspect, examine, and copy" business records did not create a right of entry). Signing the MOU therefore does not effect an immediate waiver of Fourth Amendment rights. Moreover, the employer may withdraw the consent to access at any time. *See United States v. McWeeney*, 454 F.3d 1030, 1034 (9th Cir.2006) (recognizing that a crime suspect "is free . . . after initially giving consent, to delimit or withdraw his or her consent at anytime"). Finally, the MOU itself states the only consequence that can result from failure to comply, and it is not a forcible search. Rather, DHS "may terminate the Employer's access to E-Verify." (Facts, Ex. 7, Art.II § C ¶ 15.) In no event could the federal government enter and search over the employer's objection.

If the MOU did pose some arguable threat to Fourth Amendment rights, or to continued participation in E-Verify, it is far too speculative to occasion federal court relief now. A threatened injury must be

"certainly impending" to constitute injury in fact, not hypothetically occurring at some future time contingent upon the acts of others. *Lujan*, 504 U.S. at 564 n. 2, 112 S.Ct. 2130 (quoting *Whitmore v. Arkansas*, 495 U.S. 149, 158, 110 S.Ct. 1717, 109 L.Ed.2d 135 (1990)). It is unknown whether DHS would terminate the Business-Group Plaintiffs' participation in E-Verify for refusing to grant them warrantless access to their records. The Business-Group Plaintiffs provide no evidence that DHS has done so in the past or intends to do so in the future.

It is helpful to recast the analysis in terms of ripeness. By agreeing to the MOU, the Business-Group Plaintiffs would currently lose nothing, for they later may refuse warrantless searches and have the benefit of E-Verify participation in the meantime. If at some future time the federal government expelled them from E-Verify for refusing a search, only then would they suffer a detriment. But the detriment would not be loss of a Fourth Amendment right. It would be the inability to use E-Verify from that point forward. None of that is the business of the courts today.

V. Plaintiffs Would Have Standing to Challenge the Act Based on the Economic Cost of E-Verify if They Had Sued a Proper Defendant

A. The Act Imposes Economic Injury on Plaintiffs if it Forces Them to Participate in E-Verify

Plaintiffs contend that the Act imposes economic injury upon them by forcing them to use E-Verify. Even in the absence of a specific threat of enforcement proceedings, a plaintiff may have standing based upon the economic cost of complying with a law. *National Audubon Soc'y Inc. v. Davis*, 307 F.3d

835, 856 (9th Cir.2002); *San Diego County Gun Rights Comm.*, 98 F.3d at 1130; *Cent. Ariz. Water Conservation Dist. v. U.S. EPA*, 990 F.2d 1531, 1537 (9th Cir.1993). *Cf. Lake Carriers' Ass'n v. MacMullan*, 406 U.S. 498, 507-08, 92 S.Ct. 1749, 32 L.Ed.2d 257 (1972) (holding that a case or controversy meets the constitutional test for ripeness when a plaintiff must incur expense to prepare to comply with a soon-to-become-effective statute). Plaintiffs must incur some labor and out-of-pocket costs to check the employment eligibility of new hires through E-Verify. (Facts, Ex. 10 at 34.) They have thus demonstrated that they will sustain economic injury if the law forces them to use E-Verify.

B. The Act Causes Plaintiffs Economic Injury Only if its Operation or Enforcement Coerces Compliance With the E-Verify Requirement

"The mere existence of a proscriptive statute . . . [does not] satisfly] the 'case or controversy' requirement." *Thomas*, 220 F.3d at 1139 (citing *San Diego County Gun Rights Comm.*, 98 F.3d at 1126-27). Economic injury from a statute sufficient for standing must be "fairly traceable" to the challenged statute and to the challenged actions of the defendants. *San Diego County Gun Rights Comm.*, 98 F.3d at 1130 (citing *Lujan*, 504 U.S. at 560, 112 S.Ct. 2130). "A justiciable controversy does not exist where 'compliance with [challenged] statutes is uncoerced by the risk of their enforcement.'" *Lake Carriers' Ass'n*, 406_U.S. at 507, 92 S.Ct. 1749 (alteration in original) (quoting *Poe v. Ullman*, 367 U.S. 497, 508, 81 S.Ct. 1752, 6 L.Ed.2d 989 (1961)). "A plaintiff who challenges a statute must demonstrate a realistic danger of sustaining a direct injury as a result of the statute's operation or enforcement." *Babbitt v. United*

Farm Workers Nat'l Union, 442 U.S. 289, 298, 99 S.Ct. 2301, 60 L.Ed.2d 895 (citing *O'Shea v. Littleton*, 414 U.S. 488, 494, 94 S.Ct. 669, 38 L.Ed.2d 674 (1974)).

As a threshold matter, Chicanos Por La Causa contends that A.R.S. § 23-214 forces them to enroll simply because "it is important in our country for all people to follow the law" and because "we are called upon to certify in various documents that we are not in violation of any laws." (Facts, Ex. 21 ¶ 4.) Such honorable intentions are not enough for standing. Plaintiffs must show that the operation or enforcement of the statute causes them to incur an economic injury. Chicanos Por La Causa points to no specific, imminent need to certify compliance with State law. Nor has it shown a specific consequence for not certifying, or identified the officer who would visit that consequence upon it. The Business-Group Plaintiffs' belated argument on this point at trial went beyond its pleadings and the evidence, and they failed to show that a proper defendant is before the court. These grounds do not prove that the Act forces Plaintiffs to participate in E-Verify.

Plaintiffs can show that their economic injury is fairly traceable to the Act if they have a reasonable expectation that the defendants might bring an enforcement action against them if they do not comply. For example, professional trappers who endured economic injury when they ceased trapping to comply with a new law had standing to sue the law's enforcement officer. *National Audubon Soc'y Inc. v. Davis*, 307 F.3d 835, 856 (9th Cir.2002). Even though they had received no specific threat of enforcement, they reasonably expected that the law might be enforced against them if they continued to

trap because of "(1) the newness of the statute; (2) the explicit prohibition against trapping contained in the text of [the statute]; (3) the state's unambiguous press release mandating the removal of all traps banned under [the statute]; (4) the amendment of state regulations to incorporate the provisions of [the statute]; and (5) the prosecution of one private trapper under [the statute]." *Id.*

This case presents almost all of the *National Audubon Society* factors. The Arizona Act is new, it explicitly requires employers to use E-Verify, the State has mailed notice to every employer in the State that they must comply with the terms of the Act, and at least one county attorney has issued a press release expressing his intent to enforce the Act's prohibition on employing unauthorized aliens. No person has been prosecuted under the Act because it has not yet taken effect, but there is no doubt that enforcement proceedings will occur. Plaintiffs have a reasonable expectation that the county attorney might enforce the Act against them if he obtains evidence that they employ unauthorized aliens after December 31, 2007.

The difference between *National Audubon Society* and this case is that the Act contains no explicit penalty solely for failing to use E-Verify. Although section 23-214 of the Arizona Act requires all business employers to participate in E-Verify, it authorizes no officer of the State to bring any form of enforcement action and provides no express civil or criminal penalty for noncompliance with that requirement. However, the Act may still cause Plaintiffs' economic injury if it coerces them to use E-Verify through the operation of section 23-212, which authorizes enforcement of the prohibition on employing unauthorized aliens.

C. The Operation of the Act Coerces Employers to Participate in E-Verify

Plaintiffs contend that the State coerces them to enroll in E-Verify by denying them the "rebuttable presumption that [the] employer did not intentionally employ an unauthorized alien or knowingly employ an unauthorized alien" in the event of an enforcement action. A.R.S. § 23-212(I). This replicates the rebuttable presumption that the E-Verify MOU gives to employers in federal enforcement proceedings.

The "rebuttable presumption" proves little more than what is already true: an employer who confirms a new hire's employment eligibility through E-Verify has strong evidence that it did not knowingly or intentionally employ an unauthorized alien. Even if section 23-212(I) and the MOU did not call it a "rebuttable presumption," exonerating evidence from the federal government's own records and investigation would be dispositive in the employer's favor unless it can be proved that the federal data are wrong and the employer knew it. That is a tall task in most situations. Standing alone, it is not coercion when the law recognizes the persuasive or even compelling force of evidence for those who ferret it out. Seeking good evidence is usually a choice, and a plaintiff cannot rely upon its own choice to establish injury and standing. *DMJ Assocs., L.L.C. v. Capasso*, 288 F.Supp.2d 262, 267 (E.D.N.Y.2003) (citing *Jackson-Bey v. Hanslmaier*, 115 F.3d 1091, 1095 (2d Cir.1997)).

However, the rebuttable presumption of section 23-212(I) does not stand alone. Ordinarily an employer who complies in good-faith with the federal I-9 verification system obtains an affirmative defense that it did not knowingly employ an unauthorized alien. 8

U.S.C. § 1324a(a)(3). An employer presumptively is not in violation of federal law if it examines documentation listed on the I-9 in good faith and the documentation "reasonably appears on its face to be genuine." 8 U.S.C. § 1324a(b). But where an employer has been through the E-Verify system, the defense of good faith I-9 compliance may recede into insignificance. For determining good faith, facially genuine but fraud-friendly I-9 identifying documents will not matter much if the employer also knows that the government's data and investigation, after dialog with the employee, show the employee is unauthorized. E-Verify does not repeal the I-9 defense, but rather swamps it with far better evidence.

The same may be true under the Arizona law. The Act replicates the federal law affirmative defense for good faith I-9 compliance, A.R.S. § 23-212(J), but in any enforcement proceeding the State will obtain the federal government's data on the employee's immigration status under 8 U.S.C. § 1373(c). The State court may consider only that evidence "[o]n determining whether the employee is an unauthorized alien." A.R.S. § 23-212(H). The employer's liability for license sanctions will likely turn only on whether the State proves the employer's knowledge or intent to employ an unauthorized alien.

Because the Arizona Act requires employers to use E-Verify, the Act may be read to charge employers with knowledge of the E-Verify data that they wrongfully refuse to obtain, just as the MOU charges E-Verify users with knowledge of the data for federal enforcement purposes. To read the Act differently risks reducing it to state-level duplication of the same failed federal system of enforcement that the Legislature meant to strengthen. The State plainly made E-

Verify mandatory. A.R.S. § 23-214. It did so in the hopes of taking "the most aggressive action in the country against employers who knowingly or intentionally hire undocumented workers" because "Congress finds itself incapable of coping with the comprehensive immigration reforms our country needs." (Signing statement of Gov. Napolitano, July 2, 2007, Facts, Ex. 2.)

The court need not discern now the exact meaning and effect of A.R.S. §§ 23-212(I), 23-212(J), and 23-214. The Arizona courts may do that in the course of administering the Act. It is enough at the threshold of this case that Plaintiffs reasonably fear that if they do not use E-Verify and a new employee turns out to be unauthorized, they may have no good faith defense to the Act's harsh sanctions. State courts may read the Act to hold them accountable for the knowledge from which they unlawfully averted their eyes.

This case is different from *National Audubon Society* and other cases where cost of compliance was forced and therefore provided standing. Unlike those cases, Plaintiffs' failure to use E-Verify does not violate the primary prohibition of the statute, which here is against hiring known unauthorized aliens. Failure to comply with E-Verify may increase the number of unauthorized aliens that an employer employs, especially in some industries; but unlike *National Audubon Society*, it will not directly bring greater attention from prosecutors. Therefore, the refusal to comply with E-Verify will not increase an employer's apprehension of being prosecuted to the same extent as in other cases.

On balance, the court concludes in the circumstances of this case that Plaintiffs' participation in E-Verify is not voluntary and is "fairly traceable" to the

Act. The design of the Act is to coerce compliance with E-Verify less by the nearness of prosecution than by the intolerable punishment resulting from prosecutions, which usually will be undefendable without E-Verify compliance. *In terrorem* laws force low-cost compliance even with thin enforcement.

Yet the Act does not rely on that alone. Widespread enforcement is promised, funded with appropriations. The likelihood of general prosecution is proven. The prospect of actual enforcement against any employer forgoing E-Verify is not so remote as to unlink prosecution from the felt compulsion to use E-Verify. The operation of the Act therefore coerces Plaintiffs to endure economic injury, and if they have sued a proper defendant, they have standing to challenge the provisions of the Act that require them to use E-Verify.

Plaintiffs must demonstrate that they meet Article III's case or controversy requirement independently for each provision of the Act they seek to challenge. *Clark v. City of Lakewood*, 259 F.3d 996, 1006 (9th Cir.2001) ("[A] plaintiff may have standing to challenge some provisions of a law, but not others.") (citing *4805 Convoy, Inc. v. San Diego*, 183 F.3d 1108, 1112-13 (9th Cir.1999)); *CAMP Legal Def. Fund, Inc. v. City of Atlanta*, 451 F.3d 1257, 1273 (11th Cir.2006) (citing *FW/PBS, Inc. v. Dallas*, 493 U.S. 215, 233, 110 S.Ct. 596, 107 L.Ed.2d 603 (1990), *modified in part on other grounds in City of Littleton v. Z.J. Gifts D-4, L.L.C.*, 541 U.S. 774, 782, 124 S.Ct. 2219, 159 L.Ed.2d 84 (2004)). Therefore, even if Plaintiffs have sued a proper defendant, their economic injury allows them to challenge only those aspects of the Act that logically compel them to use E-Verify.

VI. Suit Against the Governor, Attorney General, and Director Does Not Satisfy Constitutional Causation and Redressability Requirements

A. In General a Proper Defendant Must Have Authority to Enforce the Challenged Law or Have Threatened to Do So

The Governor, the Attorney General, and the Director contend that they are not proper defendants to this action. Before addressing the precise question of whether Plaintiffs may properly sue them for coerced participation in E-Verify, it is helpful to understand how the principles of causation and redressability apply in suits against state officers. "It is well-established that when a plaintiff brings a pre-enforcement challenge to the constitutionality of a particular statutory provision, the causation element of standing requires the named defendants to possess authority to enforce the complained-of provision." *Bronson v. Swensen*, 500 F.3d 1099, 1110 (10th Cir.2007) (citations omitted). There must be "the requisite causal connection between their responsibilities and any injury that the plaintiffs might suffer, such that relief against the defendants would provide redress." *Planned Parenthood of Idaho, Inc. v. Wasden*, 376 F.3d 908, 919 (9th Cir.2004) (citations omitted).

The Act allows only county attorneys to bring enforcement actions against employers for noncompliance. A.R.S. § 23-212(C). The Director has carried out his duty to send notice to Arizona employers explaining the Act's requirements and providing instructions on how to register for E-Verify 2007 Ariz. Sess. Laws, ch. 279 § 3. (Facts, Ex. 6.) An injunction to send a curative notice would be empty, for Plaintiffs have advice from their counsel in this

litigation and need no further notice about the Act from the Director. The Act does not charge the Governor with any specific duty, and her general duty to ensure that the laws are faithfully executed is not sufficient to make her a party to this challenge. *Shell Oil Co. v. Noel*, 608 F.2d 208, 212-13 (1st Cir.1979). *Cf. L.A. County Bar Ass'n v. Eu*, 979 F.2d 697, 704 (9th Cir.1992) ("[A] generalized duty to enforce state law . . . will not subject an official to suit.") (citations omitted). An injunction against either of these officials would not prevent enforcement actions under the Act or otherwise diminish its coercive effect.

The Attorney General has the authority to investigate and refer complaints to county attorneys for enforcement. A.R.S. § 23-212(B), (C). No language in the Act deprives a county attorney of the normal discretion to decide whether to proceed with an enforcement action, even where the Attorney General has referred a complaint to the county attorney. Therefore, even if a county attorney directly threatened enforcement proceedings against Plaintiffs, this case would fall under the rule that "[w]here an attorney general cannot direct, in a binding fashion, the prosecutorial activities of the officers who actually enforce the law or bring his own prosecution, he may not be a proper defendant." *Wasden*, 376 F.3d at 919 (citations omitted).

Plaintiffs would have standing to sue the Attorney General if he specifically threatened to refer a complaint against Plaintiffs to a county attorney for enforcement, or if he specifically threatened to bring enforcement proceedings himself, even though he lacks the power to do so. *Culinary Workers Union v. Del Papa*, 200 F.3d 614, 617-18 (9th Cir.1999) (distinguishing *Southern Pacific Transportation Co. v.*

Brown, 651 F.2d 613 (9th Cir.1980), and *Snoeck v. Brussa*, 153 F.3d 984 (9th Cir.1998), where the attorneys general could not be sued because they had no authority and made no threats). The Attorney General has not, however, made any specific threat against the Plaintiffs. The court must therefore determine whether the Attorney General's powers are the source of Plaintiffs' economic injury.

B. The Attorney General Does Not Cause Plaintiffs' Economic Injury

A plaintiff enduring an economic injury fairly traceable to a challenged statute must also sue a defendant whose acts cause his economic injury and against whom redress will be effective. *San Diego County Gun Rights Comm.*, 98 F.3d at 1130; *Bronson v. Swensen*, 500 F.3d 1099, 1110, 1112 (10th Cir.2007). Since the E-Verify requirement has no explicit enforcement provision, the consequence for failing to use it arises only in license sanction proceedings. In the special case of injury from cost of compliance, it is settled that a judgment against an officer who can bring enforcement proceedings is proper redress, even if the officer has made no specific threat of enforcement. *National Audubon Soc'y*, 307 F.3d at 856. It is also settled that the court can provide no redress against a state officer without power to enforce the statute. *Nova Health Systems v. Gandy*, 416 F.3d 1149, 1158 (10th Cir.2005). To say otherwise would "confuse[ ] the statute's immediate coercive effect on the plaintiffs with any coercive effect that might be applied by the defendants." *Okpalobi v. Foster*, 244 F.3d 405, 426 (5th Cir.2001) (en banc).

The causation element of standing requires that the Attorney General have enough connection to

Plaintiffs' injury that a judgment against him will protect them from having to participate in E-Verify. The parties cite no authority, and the court has found none, where a plaintiff sought relief for cost-of-compliance injury against an officer who had a facilitative role in enforcement, such as investigation or referral, but who had no direct enforcement power. Therefore, the general principle governing this issue is that redress is speculative if it turns on the independent acts of third parties, here the county attorneys. *San Diego County Gun Rights Comm.*, 98 F.3d at 1130 (plaintiffs did not have standing to sue because it was "third-party weapon dealers and manufacturers—not the government defendants—who [had] raised the prices of assault weapons").

Planned Parenthood of Idaho, Inc. v. Wasden, 376 F.3d 908 (9th Cir.2004), does not lead to a different conclusion. There, the Idaho Attorney General was held amenable to suit by a physician to enjoin a parental consent statute for minors' abortions. *Id.* at 920. Though not threatened explicitly with enforcement, he stated "a clear intention to continue to perform abortions" for his minor patients and therefore had "a reasonable fear [the] statute would be enforced against [him]." *Id.* at 917 (citing *California Pro-Life Council, Inc. v. Getman*, 328 F.3d 1088, 1094-95 (9th Cir.2003)). The attorney general was a proper defendant because, by law, he could "assist" a prosecuting attorney, and state courts had ruled that "unless the county prosecutor objects, 'the attorney general may, in his assistance, do every act that the county attorney can perform.'" *Id.* 919-20 (quoting *Newman v. Lance*, 129 Idaho 98, 922 P.2d 395, 399-401 (1996)) (emphasis omitted). Because the attorney general was able to "deputize himself" to enforce the statute in the place of the county attorney, the court

concluded that an injunction against him would redress the plaintiff's injury. *Id.*

The Arizona Attorney General has general supervisory authority over the county attorneys, A.R.S. § 41-193(4), and the authority to "assist" the county attorneys in their duties "at the direction of the Governor, or when deemed necessary." A.R.S. § 41-193(A)(5). The Attorney General may prosecute crimes when requested by a county attorney. *State v. Duran*, 118 Ariz. 239, 242-43, 575 P.2d 1265, 1268-69 (Ct.App.1978). On the other hand, no Arizona court has held that the Attorney General "may, in his assistance, do every act" that a county attorney can perform, even without objection of the county attorney. *Wasden*, 376 F.3d at 920.

Unlike the physician in *Wasden*, Plaintiffs disavow any intention of violating the law. Further, *Wasden* was a challenge to an abortion law, and several courts of appeals have held that the Supreme Court relaxed standing requirements for abortion cases in *Doe v. Bolton*, 410 U.S. 179, 93 S.Ct. 739, 35 L.Ed.2d 201 (1973). *Margaret S. v. Edwards*, 794 F.2d 994, 997 (5th Cir.1986); *Planned Parenthood Ass'n v. Cincinnati*, 822 F.2d 1390, 1396 n. 4 (6th Cir.1987); *Reprod. Health Serv. v. Webster*, 851 F.2d 1071, 1075 (8th Cir.1988) *rev'd on other grounds*, 492 U.S. 490, 109 S.Ct. 3040, 106 L.Ed.2d 410 (1989). *See also Wasden*, 376 F.3d at 917 (citing *Doe*, 410 U.S. at 188, 93 S.Ct. 739).

The Attorney General does not contend that his general power to "assist" county attorneys grants him power to enforce the Act in place of the county attorneys. In a challenge to a statute that vests enforcement in the county attorneys, an attorney general who has non-binding supervisory power is not a

proper defendant unless there is "a real likelihood that the state official will employ his supervisory powers against plaintiffs' interests." *Long v. Van de Kamp*, 961 F.2d 151, 152 (9th Cir.1992). *See also Reprod. Health Servs. of Planned Parenthood of the St. Louis Region v. Nixon*, 428 F.3d 1139, 1145 (8th Cir.2005) (holding that the attorney general was not a proper party despite his authority to aid prosecutors because his use of that power was not imminent); *Falwell v. City of Lynchburg*, 198 F.Supp.2d 765, 776 (W.D.Va.2002) ("In this case, the Plaintiffs have alleged only that the Attorney General may, at some future time, via some hypothetical mechanism, enforce [the law] against them.")

The true source of Plaintiffs' forced use of E-Verify is the county attorneys' power to instigate an enforcement action. As against the Attorney General, Plaintiffs have not shown a "substantial likelihood that the relief requested will redress its injury" of forced E-Verify compliance. *Gandy*, 416 F.3d at 1158 (citations omitted).

IT IS THEREFORE ORDERED that the Clerk enter judgment dismissing this action without prejudice for lack of subject matter jurisdiction, there being no justiciable case or controversy against the Defendants.

APPENDIX E

FEDERAL STATUTE

8 U.S.C. § 1324a. Unlawful employment of aliens

(a) Making employment of unauthorized aliens unlawful

(1) In general

It is unlawful for a person or other entity—

(A) to hire, or to recruit or refer for a fee, for employment in the United States an alien knowing the alien is an unauthorized alien (as defined in subsection (h)(3) of this section) with respect to such employment, or

(B)(i) to hire for employment in the United States an individual without complying with the requirements of subsection (b) of this section or (ii) if the person or entity is an agricultural association, agricultural employer, or farm labor contractor (as defined in section 1802 of Title 29), to hire, or to recruit or refer for a fee, for employment in the United States an individual without complying with the requirements of subsection (b) of this section.

(2) Continuing employment

It is unlawful for a person or other entity, after hiring an alien for employment in accordance with paragraph (1), to continue to employ the alien in the United States knowing the alien is (or has become) an unauthorized alien with respect to such employment.

(3) Defense

A person or entity that establishes that it has complied in good faith with the requirements of subsec-

tion (b) of this section with respect to the hiring, recruiting, or referral for employment of an alien in the United States has established an affirmative defense that the person or entity has not violated paragraph (1)(A) with respect to such hiring, recruiting, or referral.

(4) Use of labor through contract

For purposes of this section, a person or other entity who uses a contract, subcontract, or exchange, entered into, renegotiated, or extended after November 6, 1986, to obtain the labor of an alien in the United States knowing that the alien is an unauthorized alien (as defined in subsection (h)(3) of this section) with respect to performing such labor, shall be considered to have hired the alien for employment in the United States in violation of paragraph (1)(A).

(5) Use of State employment agency documentation

For purposes of paragraphs (1)(B) and (3), a person or entity shall be deemed to have complied with the requirements of subsection (b) of this section with respect to the hiring of an individual who was referred for such employment by a State employment agency (as defined by the Attorney General), if the person or entity has and retains (for the period and in the manner described in subsection (b)(3) of this section) appropriate documentation of such referral by that agency, which documentation certifies that the agency has complied with the procedures specified in subsection (b) of this section with respect to the individual's referral.

(6) Treatment of documentation for certain employees

(A) In general

For purposes of this section, if—

(i) an individual is a member of a collective-bargaining unit and is employed, under a collective bargaining agreement entered into between one or more employee organizations and an association of two or more employers, by an employer that is a member of such association, and

(ii) within the period specified in subparagraph (B), another employer that is a member of the association (or an agent of such association on behalf of the employer) has complied with the requirements of subsection (b) of this section with respect to the employment of the individual.

the subsequent employer shall be deemed to have complied with the requirements of subsection (b) of this section with respect to the hiring of the employee and shall not be liable for civil penalties described in subsection (e)(5) of this section.

(B) Period

The period described in this subparagraph is 3 years, or, if less, the period of time that the individual is authorized to be employed in the United States.

(C) Liability

(i) In general

If any employer that is a member of an association hires for employment in the United States an individual and relies upon the provisions of subparagraph (A) to comply with the requirements of subsection (b) of this section and the individual is an alien not authorized to

work in the United States, then for the purposes of paragraph (1)(A), subject to clause (ii), the employer shall be presumed to have known at the time of hiring or afterward that the individual was an alien not authorized to work in the United States.

(ii) Rebuttal of presumption

The presumption established by clause (i) may be rebutted by the employer only through the presentation of clear and convincing evidence that the employer did not know (and could not reasonably have known) that the individual at the time of hiring or afterward was an alien not authorized to work in the United States.

(iii) Exception

Clause (i) shall not apply in any prosecution under subsection (f)(1) of this section.

(7) Application to Federal Government

For purposes of this section, the term "entity" includes an entity in any branch of the Federal Government.

(b) Employment verification system

The requirements referred to in paragraphs (1)(B) and (3) of subsection (a) of this section are, in the case of a person or other entity hiring, recruiting, or referring an individual for employment in the United States, the requirements specified in the following three paragraphs:

(1) Attestation after examination of documentation

(A) In general

The person or entity must attest, under penalty of perjury and on a form designated or estab-

lished by the Attorney General by regulation, that it has verified that the individual is not an unauthorized alien by examining—

(i) a document described in subparagraph (B), or

(ii) a document described in subparagraph (C) and a document described in subparagraph (D).

Such attestation may be manifested by either a hand-written or an electronic signature. A person or entity has complied with the requirement of this paragraph with respect to examination of a document if the document reasonably appears on its face to be genuine. If an individual provides a document or combination of documents that reasonably appears on its face to be genuine and that is sufficient to meet the requirements of the first sentence of this paragraph, nothing in this paragraph shall be construed as requiring the person or entity to solicit the production of any other document or as requiring the individual to produce such another document.

(B) Documents establishing both employment authorization and identity

A document described in this subparagraph is an individual's—

(i) United States passport;

(ii) resident alien card, alien registration card, or other document designated by the Attorney General, if the document—

(I) contains a photograph of the individual and such other personal identifying information relating to the individual as the Attorney General finds, by regulation, sufficient for purposes of this subsection,

(II) is evidence of authorization of employment in the United States, and

(III) contains security features to make it resistant to tampering, counterfeiting, and fraudulent use.

(C) Documents evidencing employment authorization

A document described in this subparagraph is an individual's—

(i) social security account number card (other than such a card which specifies on the face that the issuance of the card does not authorize employment in the United States); or

(ii) other documentation evidencing authorization of employment in the United States which the Attorney General finds, by regulation, to be acceptable for purposes of this section.

(D) Documents establishing identity of individual

A document described in this subparagraph is an individual's—

(i) driver's license or similar document issued for the purpose of identification by a State, if it contains a photograph of the individual or such other personal identifying information relating to the individual as the Attorney General finds, by regulation, sufficient for purposes of this section; or

(ii) in the case of individuals under 16 years of age or in a State which does not provide for issuance of an identification document (other than a driver's license) referred to in clause (i), documentation of personal identity of such

other type as the Attorney General finds, by regulation, provides a reliable means of identification.

(E) Authority to prohibit use of certain documents

If the Attorney General finds, by regulation, that any document described in subparagraph (B), (C), or (D) as establishing employment authorization or identity does not reliably establish such authorization or identity or is being used fraudulently to an unacceptable degree, the Attorney General may prohibit or place conditions on its use for purposes of this subsection.

(2) Individual attestation of employment authorization

The individual must attest, under penalty of perjury on the form designated or established for purposes of paragraph (1), that the individual is a citizen or national of the United States, an alien lawfully admitted for permanent residence, or an alien who is authorized under this chapter or by the Attorney General to be hired, recruited, or referred for such employment. Such attestation may be manifested by either a hand-written or an electronic signature.

(3) Retention of verification form

After completion of such form in accordance with paragraphs (1) and (2), the person or entity must retain a paper, microfiche, microfilm, or electronic version of the form and make it available for inspection by officers of the Service, the Special Counsel for Immigration-Related Unfair Employment Practices, or the Department of Labor during

a period beginning on the date of the hiring, recruiting, or referral of the individual and ending—

(A) in the case of the recruiting or referral for a fee (without hiring) of an individual, three years after the date of the recruiting or referral, and

(B) in the case of the hiring of an individual—

(i) three years after the date of such hiring, or

(ii) one year after the date the individual's employment is terminated, whichever is later.

(4) Copying of documentation permitted

Notwithstanding any other provision of law, the person or entity may copy a document presented by an individual pursuant to this subsection and may retain the copy, but only (except as otherwise permitted under law) for the purpose of complying with the requirements of this subsection.

(5) Limitation on use of attestation form

A form designated or established by the Attorney General under this subsection and any information contained in or appended to such form, may not be used for purposes other than for enforcement of this chapter and sections 1001, 1028, 1546, and 1621 of Title 18.

(6) Good faith compliance

(A) In general

Except as provided in subparagraphs (B) and (C), a person or entity is considered to have complied with a requirement of this subsection notwithstanding a technical or procedural failure to meet such requirement if there was a good faith attempt to comply with the requirement.

(B) Exception if failure to correct after notice

Subparagraph (A) shall not apply if—

(i) the Service (or another enforcement agency) has explained to the person or entity the basis for the failure,

(ii) the person or entity has been provided a period of not less than 10 business days (beginning after the date of the explanation) within which to correct the failure, and

(iii) the person or entity has not corrected the failure voluntarily within such period.

(C) Exception for pattern or practice violators

Subparagraph (A) shall not apply to a person or entity that has or is engaging in a pattern or practice of violations of subsection (a)(1)(A) or (a)(2) of this section.

(c) No authorization of national identification cards

Nothing in this section shall be construed to authorize, directly or indirectly, the issuance or use of national identification cards or the establishment of a national identification card.

(d) Evaluation and changes in employment verification system

(1) Presidential monitoring and improvements in system

(A) Monitoring

The President shall provide for the monitoring and evaluation of the degree to which the employment verification system established under subsection (b) of this section provides a secure system to determine employment eligibility in the United States and shall examine the suitabil-

ity of existing Federal and State identification systems for use for this purpose.

(B) Improvements to establish secure system

To the extent that the system established under subsection (b) of this section is found not to be a secure system to determine employment eligibility in the United States, the President shall, subject to paragraph (3) and taking into account the results of any demonstration projects conducted under paragraph (4), implement such changes in (including additions to) the requirements of subsection (b) of this section as may be necessary to establish a secure system to determine employment eligibility in the United States. Such changes in the system may be implemented only if the changes conform to the requirements of paragraph (2).

(2) Restrictions on changes in system

Any change the President proposes to implement under paragraph (1) in the verification system must be designed in a manner so the verification system, as so changed, meets the following requirements:

(A) Reliable determination of identity

The system must be capable of reliably determining whether—

(i) a person with the identity claimed by an employee or prospective employee is eligible to work, and

(ii) the employee or prospective employee is claiming the identity of another individual.

(B) Using of counterfeit-resistant documents

If the system requires that a document be presented to or examined by an employer, the docu-

ment must be in a form which is resistant to counterfeiting and tampering.

(C) Limited use of system

Any personal information utilized by the system may not be made available to Government agencies, employers, and other persons except to the extent necessary to verify that an individual is not an unauthorized alien.

(D) Privacy of information

The system must protect the privacy and security of personal information and identifiers utilized in the system.

(E) Limited denial of verification

A verification that an employee or prospective employee is eligible to be employed in the United States may not be withheld or revoked under the system for any reason other than that the employee or prospective employee is an unauthorized alien.

(F) Limited use for law enforcement purposes

The system may not be used for law enforcement purposes, other than for enforcement of this chapter or sections 1001, 1028, 1546, and 1621 of Title 18.

(G) Restriction on use of new documents

If the system requires individuals to present a new card or other document (designed specifically for use for this purpose) at the time of hiring, recruitment, or referral, then such document may not be required to be presented for any purpose other than under this chapter (or enforcement of sections 1001, 1028, 1546, and 1621 of Title 18) nor to be carried on one's person.

(3) Notice to Congress before implementing changes

(A) In general

The President may not implement any change under paragraph (1) unless at least—

(i) 60 days,

(ii) one year, in the case of a major change described in subparagraph (D)(iii), or

(iii) two years, in the case of a major change described in clause (i) or (ii) of subparagraph (D),

before the date of implementation of the change, the President has prepared and transmitted to the Committee on the Judiciary of the House of Representatives and to the Committee on the Judiciary of the Senate a written report setting forth the proposed change. If the President proposes to make any change regarding social security account number cards, the President shall transmit to the Committee on Ways and Means of the House of Representatives and to the Committee on Finance of the Senate a written report setting forth the proposed change. The President promptly shall cause to have printed in the Federal Register the substance of any major change (described in subparagraph (D)) proposed and reported to Congress.

(B) Contents of report

In any report under subparagraph (A) the President shall include recommendations for the establishment of civil and criminal sanctions for unauthorized use or disclosure of the information or identifiers contained in such system.

(C) Congressional review of major changes

(i) Hearings and review

The Committees on the Judiciary of the House of Representatives and of the Senate shall cause to have printed in the Congressional Record the substance of any major change described in subparagraph (D), shall hold hearings respecting the feasibility and desirability of implementing such a change, and, within the two year period before implementation, shall report to their respective Houses findings on whether or not such a change should be implemented.

(ii) Congressional action

No major change may be implemented unless the Congress specifically provides, in an appropriations or other Act, for funds for implementation of the change.

(D) Major changes defined

As used in this paragraph, the term "major change" means a change which would—

(i) require an individual to present a new card or other document (designed specifically for use for this purpose) at the time of hiring, recruitment, or referral,

(ii) provide for a telephone verification system under which an employer, recruiter, or referrer must transmit to a Federal official information concerning the immigration status of prospective employees and the official transmits to the person, and the person must record, a verification code, or

(iii) require any change in any card used for accounting purposes under the Social Security Act [42 U.S.C.A. § 301 et seq.]; including any change requiring that the only social security account number cards which may be presented in order to comply with subsection (b)(1)(C)(i) of this section are such cards as are in a counterfeit-resistant form consistent with the second sentence of section 205(c)(2)(D) of the Social Security Act [42 U.S.C.A. § 405(c)(2)(D)].

(E) General revenue funding of social security card changes

Any costs incurred in developing and implementing any change described in subparagraph (D)(iii) for purposes of this subsection shall not be paid for out of any trust fund established under the Social Security Act [42 U.S.C.A. § 301 et seq.].

(4) *Demonstration projects*

(A) Authority

The President may undertake demonstration projects (consistent with paragraph (2)) of different changes in the requirements of subsection (b) of this section. No such project may extend over a period of longer than five years.

(B) Reports on projects

The President shall report to the Congress on the results of demonstration projects conducted under this paragraph.

(e) Compliance

(1) Complaints and investigations

The Attorney General shall establish procedures—

(A) for individuals and entities to file written, signed complaints respecting potential violations of subsection (a) or (g)(1) of this section,

(B) for the investigation of those complaints which, on their face, have a substantial probability of validity,

(C) for the investigation of such other violations of subsection (a) or (g)(1) of this section as the Attorney General determines to be appropriate, and

(D) for the designation in the Service of a unit which has, as its primary duty, the prosecution of cases of violations of subsection (a) or (g)(1) of this section under this subsection.

(2) Authority in investigations

In conducting investigations and hearings under this subsection—

(A) immigration officers and administrative law judges shall have reasonable access to examine evidence of any person or entity being investigated,

(B) administrative law judges, may, if necessary, compel by subpoena the attendance of witnesses and the production of evidence at any designated place or hearing, and

(C) immigration officers designated by the Commissioner may compel by subpoena the attendance of witnesses and the production of evidence at any designated place prior to the filing of a complaint in a case under paragraph (2).

In case of contumacy or refusal to obey a subpoena lawfully issued under this paragraph and upon application of the Attorney General, an appropriate district court of the United States may issue an or-

der requiring compliance with such subpoena and any failure to obey such order may be punished by such court as a contempt thereof.

(3) Hearing

(A) In general

Before imposing an order described in paragraph (4), (5), or (6) against a person or entity under this subsection for a violation of subsection (a) or (g)(1) of this section, the Attorney General shall provide the person or entity with notice and, upon request made within a reasonable time (of not less than 30 days, as established by the Attorney General) of the date of the notice, a hearing respecting the violation.

(B) Conduct of hearing

Any hearing so requested shall be conducted before an administrative law judge. The hearing shall be conducted in accordance with the requirements of section 554 of Title 5. The hearing shall be held at the nearest practicable place to the place where the person or entity resides or of the place where the alleged violation occurred. If no hearing is so requested, the Attorney General's imposition of the order shall constitute a final and unappealable order.

(C) Issuance of orders

If the administrative law judge determines, upon the preponderance of the evidence received, that a person or entity named in the complaint has violated subsection (a) or (g)(1) of this section, the administrative law judge shall state his findings of fact and issue and cause to be served on

such person or entity an order described in paragraph (4), (5), or (6).

(4) Cease and desist order with civil money penalty for hiring, recruiting, and referral violations

With respect to a violation of subsection (a)(1)(A) or (a)(2) of this section, the order under this subsection—

(A) shall require the person or entity to cease and desist from such violations and to pay a civil penalty in an amount of—

(i) not less than $250 and not more than $2,000 for each unauthorized alien with respect to whom a violation of either such subsection occurred.

(ii) not less than $2,000 and not more than $5,000 for each such alien in the case of a person or entity previously subject to one order under this paragraph, or

(iii) not less than $3,000 and not more than $10,000 for each such alien in the case of a person or entity previously subject to more than one order under this paragraph; and

(B) may require the person or entity—

(i) to comply with the requirements of subsection (b) of this section (or subsection (d) of this section if applicable) with respect to individuals hired (or recruited or referred for employment for a fee) during a period of up to three years, and

(ii) to take such other remedial action as is appropriate.

In applying this subsection in the case of a person or entity composed of distinct, physically separate subdivisions each of which provides separately for the hiring, recruiting, or referring for employment, without reference to the practices of, and not under the control of or common control with, another subdivision, each such subdivision shall be considered a separate person or entity.

(5) Order for civil money penalty for paperwork violations

With respect to a violation of subsection (a)(1)(B) of this section, the order under this subsection shall require the person or entity to pay a civil penalty in an amount of not less than $100 and not more than $1,000 for each individual with respect to whom such violation occurred. In determining the amount of the penalty, due consideration shall be given to the size of the business of the employer being charged, the good faith of the employer, the seriousness of the violation, whether or not the individual was an unauthorized alien, and the history of previous violations.

(6) Order for prohibited indemnity bonds

With respect to a violation of subsection (g)(1) of this section, the order under this subsection may provide for the remedy described in subsection (g)(2) of this section.

(7) Administrative appellate review

The decision and order of an administrative law judge shall become the final agency decision and order of the Attorney General unless either (A) within 30 days, an official delegated by regulation

to exercise review authority over the decision and order modifies or vacates the decision and order, or (B) within 30 days of the date of such a modification or vacation (or within 60 days of the date of decision and order of an administrative law judge if not so modified or vacated) the decision and order is referred to the Attorney General pursuant to regulations, in which case the decision and order of the Attorney General shall become the final agency decision and order under this subsection. The Attorney General may not delegate the Attorney General's authority under this paragraph to any entity which has review authority over immigration-related matters.

(8) Judicial review

A person or entity adversely affected by a final order respecting an assessment may, within 45 days after the date the final order is issued, file a petition in the Court of Appeals for the appropriate circuit for review of the order.

(9) Enforcement of orders

If a person or entity fails to comply with a final order issued under this subsection against the person or entity, the Attorney General shall file a suit to seek compliance with the order in any appropriate district court of the United States. In any such suit, the validity and appropriateness of the final order shall not be subject to review.

(f) Criminal penalties and injunctions for pattern or practice violations

(1) Criminal penalty

Any person or entity which engages in a pattern or practice of violations of subsection (a)(1)(A) or (a)(2) of this section shall be fined not more than $3,000

for each unauthorized alien with respect to whom such a violation occurs, imprisoned for not more than six months for the entire pattern or practice, or both, notwithstanding the provisions of any other Federal law relating to fine levels.

(2) Enjoining of pattern or practice violations

Whenever the Attorney General has reasonable cause to believe that a person or entity is engaged in a pattern or practice of employment, recruitment, or referral in violation of paragraph (1)(A) or (2) of subsection (a) of this section, the Attorney General may bring a civil action in the appropriate district court of the United States requesting such relief, including a permanent or temporary injunction, restraining order, or other order against the person or entity, as the Attorney General deems necessary.

(g) Prohibition of indemnity bonds

(1) Prohibition

It is unlawful for a person or other entity, in the hiring, recruiting, or referring for employment of any individual, to require the individual to post a bond or security, to pay or agree to pay an amount, or otherwise to provide a financial guarantee or indemnity, against any potential liability arising under this section relating to such hiring, recruiting, or referring of the individual.

(2) Civil penalty

Any person or entity which is determined, after notice and opportunity for an administrative hearing under subsection (e) of this section, to have violated paragraph (1) shall be subject to a civil penalty of $1,000 for each violation and to an administrative order requiring the return of any amounts received

in violation of such paragraph to the employee or, if the employee cannot be located, to the general fund of the Treasury.

(h) Miscellaneous provisions

(1) Documentation

In providing documentation or endorsement of authorization of aliens (other than aliens lawfully admitted for permanent residence) authorized to be employed in the United States, the Attorney General shall provide that any limitations with respect to the period or type of employment or employer shall be conspicuously stated on the documentation or endorsement.

(2) Preemption

The provisions of this section preempt any State or local law imposing civil or criminal sanctions (other than through licensing and similar laws) upon those who employ, or recruit or refer for a fee for employment, unauthorized aliens.

(3) Definition of unauthorized alien

As used in this section, the term "unauthorized alien" means, with respect to the employment of an alien at a particular time, that the alien is not at that time either (A) an alien lawfully admitted for permanent residence, or (B) authorized to be so employed by this chapter or by the Attorney General.

HISTORICAL AND STATUTORY NOTES

* * * *

Pilot Programs for Employment Eligibility Confirmation

Pub.L. 104-208, Div. C, Title IV, Subtitle A, §§ 401 to 405, Sept. 30, 1996, 110 Stat. 3009-655 to 3009-665,

as amended Pub.L. 107-128, § 2, Jan. 16, 2002, 115 Stat. 2407; Pub.L. 108-156, §§ 2, 3, Dec. 3, 2003, 117 Stat. 1944, provided that:

"Sec. 401. Establishment of programs.

"(a) In general.—The Secretary of Homeland Security shall conduct 3 pilot programs of employment eligibility confirmation under this subtitle [this note].

"(b) Implementation deadline; termination.—The Secretary of Homeland Security shall implement the pilot programs in a manner that permits persons and other entities to have elections under section 402 of this division made and in effect no later than 1 year after the date of the enactment of this Act [Sept. 30, 1996]. Unless the Congress otherwise provides, the Secretary of Homeland Security shall terminate a pilot program at the end of the 11-year period beginning on the first day the pilot program is in effect.

"(c) Scope of operation of pilot programs.—The Secretary of Homeland Security shall provide for the operation—

"(1) of the basic pilot program (described in section 403(a) of this division) in, at a minimum, 5 of the 7 States with the highest estimated population of aliens who are not lawfully present in the United States, and the Secretary of Homeland Security shall expand the operation of the program to all 50 States not later than December 1, 2004;

"(2) of the citizen attestation pilot program (described in section 403(b) of this division) in at least 5 States (or, if fewer, all of the States) that meet the condition described in section 403(b)(2)(A) of this division; and

"(3) of the machine-readable-document pilot program (described in section 403(c) of this division) in at least 5 States (or, if fewer, all of the States) that meet the condition described in section 403(c)(2) of this division.

"(d) References in subtitle.—In this subtitle [this note]—

"(1) Pilot program references.—The terms 'program' or 'pilot program' refer to any of the 3 pilot programs provided for under this subtitle [this note].

"(2) Confirmation system.—The term 'confirmation system' means the confirmation system established under section 404 of this division.

"(3) References to section 274A.—Any reference in this subtitle [this note] to section 274A (or a subdivision of such section) is deemed a reference to such section (or subdivision thereof) of the Immigration and Nationality Act [this section].

"(4) I-9 or similar form.—The term 'I-9 or similar form' means the form used for purposes of section 274A(b)(1)(A) [subsec. (b)(1)(A) of this section] or such other form as the Secretary of Homeland Security determines to be appropriate.

"(5) Limited application to recruiters and referrers.—Any reference to recruitment or referral (or a recruiter or referrer) in relation to employment is deemed a reference only to such recruitment or referral (or recruiter or referrer) that is subject to section 274A(a)(1)(B)(ii) [subsec. (a)(1)(B)(ii) of this section].

"(6) United States citizenship.—The term 'United States citizenship' includes United States nationality.

"(7) State.—The term 'State' has the meaning given such term in section 101(a)(36) of the Immigration and Nationality Act [section 110(a)(36) of this title].

"Sec. 402. Voluntary election to participate in a pilot program.

"(a) Voluntary election.—Subject to subsection (c)(3)(B), any person or other entity that conducts any hiring (or recruitment or referral) in a State in which a pilot program is operating may elect to participate in that pilot program. Except as specifically provided in subsection (e), the Secretary of Homeland Security may not require any person or other entity to participate in a pilot program.

"(b) Benefit of rebuttable presumption.—

"(1) In general.—If a person or other entity is participating in a pilot program and obtains confirmation of identity and employment eligibility in compliance with the terms and conditions of the program with respect to the hiring (or recruitment or referral) of an individual for employment in the United States, the person or entity has established a rebuttable presumption that the person or entity has not violated section 274A(a)(1)(A) [subsec. (a)(1)(A) of this section] with respect to such hiring (or such recruitment or referral).

"(2) Construction.—Paragraph (1) shall not be construed as preventing a person or other entity that has an election in effect under subsection (a) from establishing an affirmative defense under section 274A(a)(3) [subsec. (a)(3) of this section] if the person or entity complies with the requirements of section 274A(a)(1)(B) [subsec. (a)(1)(B) of this section] but fails to obtain confirmation under paragraph (1).

"(c) General terms of elections.—

"(1) In general.—An election under subsection (a) shall be in such form and manner, under such terms and conditions, and shall take effect, as the Secretary of Homeland Security shall specify. The Secretary of Homeland Security may not impose any fee as a condition of making an election or participating in a pilot program.

"(2) Scope of election.—

"(A) In general.—Subject to paragraph (3), any electing person or other entity may provide that the election under subsection (a) shall apply (during the period in which the election is in effect)—

"(i) to all its hiring (and all recruitment or referral) in the State (or States) in which the pilot program is operating, or

"(ii) to its hiring (or recruitment or referral) in one or more pilot program States or one or more places of hiring (or recruitment or referral, as the case may be) in the pilot program States.

"(B) Application of programs in non-pilot program States.—In addition, the Secretary of Homeland Security may permit a person or entity electing the citizen attestation pilot program (described in 403(b) of this division) or the machine-readable-document pilot program (described in section 403(c) of this division) to provide that the election applies to its hiring (or recruitment or referral) in one or more States or places of hiring (or recruitment or referral) in which the pilot program is not otherwise operating but only if such States meet the requirements of 403(b)(2)(A) and 403(c)(2) of this division, respectively.

"(3) Termination of elections.—The Secretary of Homeland Security may terminate an election by a person or other entity under this section because the person or entity has substantially failed to comply with its obligations under the pilot program. A person or other entity may terminate an election in such form and manner as the Secretary of Homeland Security shall specify.

"(d) Consultation, education, and publicity.—

"(1) Consultation.—The Secretary of Homeland Security shall closely consult with representatives of employers (and recruiters and referrers) in the development and implementation of the pilot programs, including the education of employers (and recruiters and referrers) about such programs.

"(2) Publicity.—The Secretary of Homeland Security shall widely publicize the election process and pilot programs, including the voluntary nature of the pilot programs and the advantages to employers (and recruiters and referrers) of making an election under this section.

"(3) Assistance through District offices.—The Secretary of Homeland Security shall designate one or more individuals in each District office of the Immigration and Naturalization Service for a Service District in which a pilot program is being implemented—

"(A) to inform persons and other entities that seek information about pilot programs of the voluntary nature of such programs, and

"(B) to assist persons and other entities in electing and participating in any pilot programs in effect in the District, in complying with the requirements

of section 274A [this section], and in facilitating confirmation of the identity and employment eligibility of individuals consistent with such section.

"(e) Select entities required to participate in a pilot program.—

"(1) Federal Government.—

"(A) Executive Departments.—

"(i) In general.—Each Department of the Federal Government shall elect to participate in a pilot program and shall comply with the terms and conditions of such an election.

"(ii) Election.—Subject to clause (iii), the Secretary of each such Department—

"(I) shall elect the pilot program (or programs) in which the Department shall participate, and

"(II) may limit the election to hiring occurring in certain States (or geographic areas) covered by the program (or programs) and in specified divisions within the Department, so long as all hiring by such divisions and in such locations is covered.

"(iii) Role of Secretary of Homeland Security.—The Secretary of Homeland Security shall assist and coordinate elections under this subparagraph in such manner as assures that—

"(I) a significant portion of the total hiring within each Department within States covered by a pilot program is covered under such a program, and

"(II) there is significant participation by the Federal Executive branch in each of the pilot programs.

"(B) Legislative branch.—Each Member of Congress, each officer of Congress, and the head of each agency of the legislative branch, that conducts hiring in a State in which a pilot program is operating shall elect to participate in a pilot program, may specify which pilot program or programs (if there is more than one) in which the Member, officer, or agency will participate, and shall comply with the terms and conditions of such an election.

"(2) Application to certain violators.—An order under section 274A(e)(4) [subsec. (e)(4) of this section] or section 274B(g) of the Immigration and Nationality Act [section 1324b(g) of this title] may require the subject of the order to participate in, and comply with the terms of, a pilot program with respect to the subject's hiring (or recruitment or referral) of individuals in a State covered by such a program.

"(3) Consequence of failure to participate.—If a person or other entity is required under this subsection to participate in a pilot program and fails to comply with the requirements of such program with respect to an individual—

"(A) such failure shall be treated as a violation of section 274A(a)(1)(B) [subsec. (a)(1)(B) of this section] with respect to that individual, and

"(B) a rebuttable presumption is created that the person or entity has violated section 274A(a)(1)(A) [subsec. (a)(1)(A) of this section].

Subparagraph (B) shall not apply in any prosecution under section 274A(f)(1) [subsec. (f)(1) of this section].

"(f) Construction.—This subtitle [this note] shall not affect the authority of the Secretary of Homeland Security under any other law (including section 274A(d)(4) [subsec. (d)(4) of this section) to conduct demonstration projects in relation to section 274A [this section].

"Sec. 403. Procedures for participants in pilot programs.

"(a) Basic pilot program.—A person or other entity that elects to participate in the basic pilot program described in this subsection agrees to conform to the following procedures in the case of the hiring (or recruitment or referral) for employment in the United States of each individual covered by the election:

"(1) Provision of additional information.—The person or entity shall obtain from the individual (and the individual shall provide) and shall record on the I-9 or similar form—

"(A) the individual's social security account number, if the individual has been issued such a number, and

"(B) if the individual does not attest to United States citizenship under section 274A(b)(2) [subsec. (b)(2) of this section], such identification or authorization number established by the Immigration and Naturalization Service for the alien as the Secretary of Homeland Security shall specify,

and shall retain the original form and make it available for inspection for the period and in the manner required of I-9 forms under section 274A(b)(3) [subsec. (b)(3) of this section].

"(2) Presentation of documentation.—

"(A) In general.—The person or other entity, and the individual whose identity and employment

eligibility are being confirmed, shall, subject to subparagraph (B), fulfill the requirements of section 274A(b) [subsec. (b) of this section] with the following modifications:

"(i) A document referred to in section 274A(b)(1)(B)(ii) (as redesignated by section 412(a) of this division) [subsec. (b)(1)(B)(ii) of this section, as redesignated by section 412(a) of Div. C of Pub.L. 104-208] must be designated by the Secretary of Homeland Security as suitable for the purpose of identification in a pilot program.

"(ii) A document referred to in section 274A(b)(1)(D) [subsec. (b)(1)(D) of this section] must contain a photograph of the individual.

"(iii) The person or other entity has complied with the requirements of section 274A(b)(1) [subsec. (b)(1) of this section] with respect to examination of a document if the document reasonably appears on its face to be genuine and it reasonably appears to pertain to the individual whose identity and work eligibility is being confirmed.

"(B) Limitation of requirement to examine documentation.—If the Secretary of Homeland Security finds that a pilot program would reliably determine with respect to an individual whether—

"(i) the person with the identity claimed by the individual is authorized to work in the United States, and

"(ii) the individual is claiming the identity of another person,

if a person or entity could fulfill the requirement to examine documentation contained in subparagraph (A) of section 274A(b)(1) [subsec. (b)(1)(A) of this section] by examining a document specified in either subparagraph (B) or (D) of such section [subsec. (b)(1)(B) or (D) of this section], the Secretary of Homeland Security may provide that, for purposes of such requirement, only such a document need be examined. In such case, any reference in section 274A(b)(1)(A) [subsec. (b)(1)(A) of this section] to a verification that an individual is not an unauthorized alien shall be deemed to be a verification of the individual's identity.

"(3) Seeking confirmation.—

"(A) In general.—The person or other entity shall make an inquiry, as provided in section 404(a)(1) of this division, using the confirmation system to seek confirmation of the identity and employment eligibility of an individual, by not later than the end of 3 working days (as specified by the Secretary of Homeland Security) after the date of the hiring (or recruitment or referral, as the case may be).

"(B) Extension of time period.—If the person or other entity in good faith attempts to make an inquiry during such 3 working days and the confirmation system has registered that not all inquiries were received during such time, the person or entity can make an inquiry in the first subsequent working day in which the confirmation system registers that it has received all inquiries. If the confirmation system cannot receive inquiries at all times during a day, the person or entity merely has to assert that the entity attempted to

make the inquiry on that day for the previous sentence to apply to such an inquiry, and does not have to provide any additional proof concerning such inquiry.

"(4) Confirmation or nonconfirmation.—

"(A) Confirmation upon initial inquiry.—If the person or other entity receives an appropriate confirmation of an individual's identity and work eligibility under the confirmation system within the time period specified under section 404(b) of this division, the person or entity shall record on the I-9 or similar form an appropriate code that is provided under the system and that indicates a final confirmation of such identity and work eligibility of the individual.

"(B) Nonconfirmation upon initial inquiry and secondary verification.—

"(i) Nonconfirmation.—If the person or other entity receives a tentative nonconfirmation of an individual's identity or work eligibility under the confirmation system within the time period specified under 404(b) of this division, the person or entity shall so inform the individual for whom the confirmation is sought.

"(ii) No contest.—If the individual does not contest the nonconfirmation within the time period specified in section 404(c) of this division, the nonconfirmation shall be considered final. The person or entity shall then record on the I-9 or similar form an appropriate code which has been provided under the system to indicate a tentative nonconfirmation.

"(iii) Contest.—If the individual does contest the nonconfirmation, the individual shall utilize the process for secondary verification provided under section 404(c) of this division. The nonconfirmation will remain tentative until a final confirmation or nonconfirmation is provided by the confirmation system within the time period specified in such section. In no case shall an employer terminate employment of an individual because of a failure of the individual to have identity and work eligibility confirmed under this section until a nonconfirmation becomes final. Nothing in this clause shall apply to a termination of employment for any reason other than because of such a failure.

"(iv) Recording of conclusion on form.—If a final confirmation or nonconfirmation is provided by the confirmation system under section 404(c) of this division regarding an individual, the person or entity shall record on the I-9 or similar form an appropriate code that is provided under the system and that indicates a confirmation or nonconfirmation of identity and work eligibility of the individual.

"(C) Consequences of nonconfirmation.—

"(i) Termination or notification of continued employment.—If the person or other entity has received a final nonconfirmation regarding an individual under subparagraph (B), the person or entity may terminate employment (or recruitment or referral) of the individual. If the person or entity does not terminate employment (or recruitment or referral) of the individual, the person or entity shall notify the Secretary of Homeland Security of such fact

through the confirmation system or in such other manner as the Attorney General may specify.

"(ii) Failure to notify.—If the person or entity fails to provide notice with respect to an individual as required under clause (i), the failure is deemed to constitute a violation of section 274A(a)(1)(B) [subsec. (a)(1)(B) of this section] with respect to that individual and the applicable civil monetary penalty under section 274A(e)(5) [subsec. (e)(5) of this section] shall be (notwithstanding the amounts specified in such section) no less than $500 and no more than $1,000 for each individual with respect to whom such violation occurred.

"(iii) Continued employment after final nonconfirmation.—If the person or other entity continues to employ (or to recruit or refer) an individual after receiving final nonconfirmation, a rebuttable presumption is created that the person or entity has violated section 274A(a)(1)(A) [subsec. (a)(1)(A) of this section]. The previous sentence shall not apply in any prosecution under section 274A(f)(1) [subsec. (f)(1) of this section].

"(b) Citizen attestation pilot program.—

"(1) In general.—Except as provided in paragraphs (3) through (5), the procedures applicable under the citizen attestation pilot program under this subsection shall be the same procedures as those under the basic pilot program under subsection (a).

"(2) Restrictions.—

"(A) State document requirement to participate in pilot program.—The Secretary of Homeland

Security may not provide for the operation of the citizen attestation pilot program in a State unless each driver's license or similar identification document described in section 274A(b)(1)(D)(i) [subsec. (b)(1)(D)(i) of this section] issued by the State—

"(i) contains a photograph of the individual involved, and

"(ii) has been determined by the Secretary of Homeland Security to have security features, and to have been issued through application and issuance procedures, which make such document sufficiently resistant to counterfeiting, tampering, and fraudulent use that it is a reliable means of identification for purposes of this section.

"(B) Authorization to limit employer participation.—The Attorney General may restrict the number of persons or other entities that may elect to participate in the citizen attestation pilot program under this subsection as the Secretary of Homeland Security determines to be necessary to produce a representative sample of employers and to reduce the potential impact of fraud.

"(3) No confirmation required for certain individuals attesting to U.S. citizenship.—In the case of a person or other entity hiring (or recruiting or referring) an individual under the citizen attestation pilot program, if the individual attests to United States citizenship (under penalty of perjury on an I-9 or similar form which form states on its face the criminal and other penalties provided under law for a false representation of United States citizenship) —

"(A) the person or entity may fulfill the requirement to examine documentation contained in subparagraph (A) of section 274A(b)(1) [subsec. (b)(1)(A) of this section] by examining a document specified in either subparagraph (B)(i) or (D) of such section [subsec. (b)(1)(B)(i) or (D) of this section]; and

"(B) the person or other entity is not required to comply with respect to such individual with the procedures described in paragraphs (3) and (4) of subsection (a), but only if the person or entity retains the form and makes it available for inspection in the same manner as in the case of an I-9 form under section 274A(b)(3) [subsec. (b)(3) of this section].

"(4) Waiver of document presentation requirement in certain cases.—

"(A) In general.—In the case of a person or entity that elects, in a manner specified by the Secretary of Homeland Security consistent with subparagraph (B), to participate in the pilot program under this paragraph, if an individual being hired (or recruited or referred) attests (in the manner described in paragraph (3)) to United States citizenship and the person or entity retains the form on which the attestation is made and makes it available for inspection in the same manner as in the case of an I-9 form under section 274A(b)(3) [subsec. (b)(3) of this section], the person or entity is not required to comply with the procedures described in section 274A(b) [subsec. (b) of this section].

"(B) Restriction.—The Secretary of Homeland Security shall restrict the election under this pa-

ragraph to no more than 1,000 employers and, to the extent practicable, shall select among employers seeking to make such election in a manner that provides for such an election by a representative sample of employers.

"(5) Nonreviewable determinations.—The determinations of the Secretary of Homeland Security under paragraphs (2) and (4) are within the discretion of the Secretary of Homeland Security and are not subject to judicial or administrative review.

"(c) Machine-readable-document pilot program.—

"(1) In general.—Except as provided in paragraph (3), the procedures applicable under the machine-readable-document pilot program under this subsection shall be the same procedures as those under the basic pilot program under subsection (a).

"(2) State document requirement to participate in pilot program.—The Secretary of Homeland Security may not provide for the operation of the machine-readable-document pilot program in a State unless driver's licenses and similar identification documents described in section 274A(b)(1)(D)(i) [subsec. (b)(1)(D)(i) of this section] issued by the State include a machine-readable social security account number.

"(3) Use of machine-readable documents.—If the individual whose identity and employment eligibility must be confirmed presents to the person or entity hiring (or recruiting or referring) the individual a license or other document described in paragraph (2) that includes a machine-readable social security account number, the person or entity must make an inquiry through the confirmation system by using a machine-readable feature of such docu-

ment. If the individual does not attest to United States citizenship under section 274A(b)(2) [subsec. (b)(2) of this section], the individual's identification or authorization number described in subsection (a)(1)(B) shall be provided as part of the inquiry.

"(d) Protection from liability for actions taken on the basis of information provided by the confirmation system.—No person or entity participating in a pilot program shall be civilly or criminally liable under any law for any action taken in good faith reliance on information provided through the confirmation system.

"Sec. 404. Employment eligibility confirmation system.

"(a) In general.—The Secretary of Homeland Security shall establish a pilot program confirmation system through which the Attorney General (or a designee of the Secretary of Homeland Security, which may be a nongovernmental entity)—

"(1) responds to inquiries made by electing persons and other entities (including those made by the transmittal of data from machine-readable documents under the machine-readable pilot program) at any time through a toll-free telephone line or other toll-free electronic media concerning an individual's identity and whether the individual is authorized to be employed, and

"(2) maintains records of the inquiries that were made, of confirmations provided (or not provided), and of the codes provided to inquirers as evidence of their compliance with their obligations under the pilot programs.

To the extent practicable, the Secretary of Homeland Security shall seek to establish such a system using one or more nongovernmental entities.

"(b) Initial response.—The confirmation system shall provide confirmation or a tentative nonconfirmation of an individual's identity and employment eligibility within 3 working days of the initial inquiry. If providing confirmation or tentative nonconfirmation, the confirmation system shall provide an appropriate code indicating such confirmation or such nonconfirmation.

"(c) Secondary verification process in case of tentative nonconfirmation.—In cases of tentative nonconfirmation, the Attorney General shall specify, in consultation with the Commissioner of Social Security and the Commissioner of the Immigration and Naturalization Service, an available secondary verification process to confirm the validity of information provided and to provide a final confirmation or nonconfirmation within 10 working days after the date of the tentative nonconfirmation. When final confirmation or nonconfirmation is provided, the confirmation system shall provide an appropriate code indicating such confirmation or nonconfirmation.

"(d) Design and operation of system.—The confirmation system shall be designed and operated—

"(1) to maximize its reliability and ease of use by persons and other entities making elections under section 402(a) of this division consistent with insulating and protecting the privacy and security of the underlying information;

"(2) to respond to all inquiries made by such persons and entities on whether individuals are authorized to be employed and to register all times when such inquiries are not received;

"(3) with appropriate administrative, technical, and physical safeguards to prevent unauthorized disclosure of personal information; and

"(4) to have reasonable safeguards against the system's resulting in unlawful discriminatory practices based on national origin or citizenship status, including—

"(A) the selective or unauthorized use of the system to verify eligibility;

"(B) the use of the system prior to an offer of employment; or

"(C) the exclusion of certain individuals from consideration for employment as a result of a perceived likelihood that additional verification will be required, beyond what is required for most job applicants.

"(e) Responsibilities of the Commissioner of Social Security.—As part of the confirmation system, the Commissioner of Social Security, in consultation with the entity responsible for administration of the system, shall establish a reliable, secure method, which, within the time periods specified under subsections (b) and (c), compares the name and social security account number provided in an inquiry against such information maintained by the Commissioner in order to confirm (or not confirm) the validity of the information provided regarding an individual whose identity and employment eligibility must be confirmed, the correspondence of the name and number, and whether the individual has presented a social security account number that is not valid for employment. The Commissioner shall not disclose or release social security information (other than such confirmation or nonconfirmation).

"(f) Responsibilities of the Commissioner of the Immigration and Naturalization Service.—As part of the confirmation system, the Commissioner of the Immigration and Naturalization Service, in consultation with the entity responsible for administration of the system, shall establish a reliable, secure method, which, within the time periods specified under subsections (b) and (c), compares the name and alien identification or authorization number described in section 403(a)(1)(B) of this division which are provided in an inquiry against such information maintained by the Commissioner in order to confirm (or not confirm) the validity of the information provided, the correspondence of the name and number, and whether the alien is authorized to be employed in the United States.

"(g) Updating information.—The Commissioners of Social Security and the Immigration and Naturalization Service shall update their information in a manner that promotes the maximum accuracy and shall provide a process for the prompt correction of erroneous information, including instances in which it is brought to their attention in the secondary verification process described in subsection (c).

"(h) Limitation on use of the confirmation system and any related systems.—

"(1) In general.—Notwithstanding any other provision of law, nothing in this subtitle [this note] shall be construed to permit or allow any department, bureau, or other agency of the United States Government to utilize any information, data base, or other records assembled under this subtitle [this note] for any other purpose other than as provided for under a pilot program.

"(2) No national identification card.—Nothing in this subtitle [this note] shall be construed to authorize, directly or indirectly, the issuance or use of national identification cards or the establishment of a national identification card.

"Sec. 405. Reports.

"(a) In general.—The Secretary of Homeland Security shall submit to the Committees on the Judiciary of the House of Representatives and of the Senate reports on the pilot programs within 3 months after the end of the third and fourth years in which the programs are in effect. Such reports shall—

"(1) assess the degree of fraudulent attesting of United States citizenship,

"(2) include recommendations on whether or not the pilot programs should be continued or modified, and

"(3) assess the benefits of the pilot programs to employers and the degree to which they assist in the enforcement of section 274A [this section]."

"(b) Report on expansion.—Not later than June 1, 2004, the Secretary of Homeland Security shall submit to the Committees on the Judiciary of the House of Representatives and the Senate a report—

"(1) evaluating whether the problems identified by the report submitted under subsection (a) have been substantially resolved; and

"(2) describing what actions the Secretary of Homeland Security shall take before undertaking the expansion of the basic pilot program to all 50 States in accordance with section 401(c)(1) [of this note], in order to resolve any outstanding problems raised in the report filed under subsection (a)."

* * * *

APPENDIX F

STATE STATUTES

Ariz. Rev. Stat. § 23-211. Definitions

In this article, unless the context otherwise requires:

1. "Agency" means any agency, department, board or commission of this state or a county, city or town that issues a license for purposes of operating a business in this state.

2. "Employ" means hiring an employee after December 31, 2007.

3. "Employee":

   (a) Means any person who provides services or labor for an employer in this state for wages or other remuneration.

   (b) Does not include an independent contractor.

4. "Employer" means any individual or type of organization that transacts business in this state, that has a license issued by an agency in this state and that employs one or more employees in this state. Employer includes this state, any political subdivision of this state and self-employed persons. In the case of an independent contractor, employer means the independent contractor and does not mean the person or organization that uses the contract labor.

5. "E-verify program" means the employment verification pilot program as jointly administered by the United States department of homeland security and the social security administration or any of its successor programs.

6. "Independent contractor" means any individual or entity that carries on an independent business, that contracts to do a piece of work according to the

individual's or entity's own means and methods and that is subject to control only as to results. Whether an individual or entity is an independent contractor is determined on a case-by-case basis through various factors, including whether the individual or entity:

(a) Supplies the tools or materials.

(b) Makes services available to the general public.

(c) Works or may work for a number of clients at the same time.

(d) Has an opportunity for profit or loss as a result of labor or service provided.

(e) Invests in the facilities for work.

(f) Directs the order or sequence in which the work is completed.

(g) Determines the hours when the work is completed.

7. "Intentionally" has the same meaning prescribed in § 13-105.

8. "Knowingly employ an unauthorized alien" means the actions described in 8 United States Code § 1324a. This term shall be interpreted consistently with 8 United States Code § 1324a and any applicable federal rules and regulations.

9. "License":

(a) Means any agency permit, certificate, approval, registration, charter or similar form of authorization that is required by law and that is issued by any agency for the purposes of operating a business in this state.

(b) Includes:

(i) Articles of incorporation under title 10.

(ii) A certificate of partnership, a partnership registration or articles of organization under title 29.

(iii) A grant of authority issued under title 10, chapter 15.

(iv) Any transaction privilege tax license.

(c) Does not include:

(i) Any license issued pursuant to title 45 or 49 or rules adopted pursuant to those titles.

(ii) Any professional license.

10. "Social security number verification service" means the program administered by the social security administration or any of its successor programs.

11. "Unauthorized alien" means an alien who does not have the legal right or authorization under federal law to work in the United States as described in 8 United States Code § 1324a(h)(3).

Ariz. Rev. Stat. § 23-212. Knowingly employing unauthorized aliens; prohibition; false and frivolous complaints; violation; classification; license suspension and revocation; affirmative defense

A. An employer shall not knowingly employ an unauthorized alien. If, in the case when an employer uses a contract, subcontract or other independent contractor agreement to obtain the labor of an alien in this state, the employer knowingly contracts with an unauthorized alien or with a person who employs or contracts with an unauthorized alien to perform the labor, the employer violates this subsection.

B. The attorney general shall prescribe a complaint form for a person to allege a violation of subsection A of this section. The complainant shall not be required to list the complainant's social security number on the complaint form or to have the complaint form notarized. On receipt of a complaint on a prescribed complaint form that an employer allegedly knowingly employs an unauthorized alien, the attorney general or county attorney shall investigate whether the employer has violated subsection A of this section. If a complaint is received but is not submitted on a prescribed complaint form, the attorney general or county attorney may investigate whether the employer has violated subsection A of this section. This subsection shall not be construed to prohibit the filing of anonymous complaints that are not submitted on a prescribed complaint form. The attorney general or county attorney shall not investigate complaints that are based solely on race, color or national origin. A complaint that is submitted to a county attorney shall be submitted to the county attorney in the county in which the alleged unauthorized alien is

or was employed by the employer. The county sheriff or any other local law enforcement agency may assist in investigating a complaint. When investigating a complaint, the attorney general or county attorney shall verify the work authorization of the alleged unauthorized alien with the federal government pursuant to 8 United States Code § 1373(c). A state, county or local official shall not attempt to independently make a final determination on whether an alien is authorized to work in the United States. An alien's immigration status or work authorization status shall be verified with the federal government pursuant to 8 United States Code § 1373(c). A person who knowingly files a false and frivolous complaint under this subsection is guilty of a class 3 misdemeanor.

C. If, after an investigation, the attorney general or county attorney determines that the complaint is not false and frivolous:

1. The attorney general or county attorney shall notify the United States immigration and customs enforcement of the unauthorized alien.

2. The attorney general or county attorney shall notify the local law enforcement agency of the unauthorized alien.

3. The attorney general shall notify the appropriate county attorney to bring an action pursuant to subsection D of this section if the complaint was originally filed with the attorney general.

D. An action for a violation of subsection A of this section shall be brought against the employer by the county attorney in the county where the unauthorized alien employee is or was employed by the employer. The county attorney shall not bring an action against any employer for any violation of subsection A of this

section that occurs before January 1, 2008. A second violation of this section shall be based only on an unauthorized alien who is or was employed by the employer after an action has been brought for a violation of subsection A of this section or § 23-212.01, subsection A.

E. For any action in superior court under this section, the court shall expedite the action, including assigning the hearing at the earliest practicable date.

F. On a finding of a violation of subsection A of this section:

1. For a first violation, as described in paragraph 3 of this subsection, the court:

(a) Shall order the employer to terminate the employment of all unauthorized aliens.

(b) Shall order the employer to be subject to a three year probationary period for the business location where the unauthorized alien performed work. During the probationary period the employer shall file quarterly reports in the form provided in § 23-722.01 with the county attorney of each new employee who is hired by the employer at the business location where the unauthorized alien performed work.

(c) Shall order the employer to file a signed sworn affidavit with the county attorney within three business days after the order is issued. The affidavit shall state that the employer has terminated the employment of all unauthorized aliens in this state and that the employer will not intentionally or knowingly employ an unauthorized alien in this state. The court shall order the appropriate agencies to suspend all licenses

subject to this subdivision that are held by the employer if the employer fails to file a signed sworn affidavit with the county attorney within three business days after the order is issued. All licenses that are suspended under this subdivision shall remain suspended until the employer files a signed sworn affidavit with the county attorney. Notwithstanding any other law, on filing of the affidavit the suspended licenses shall be reinstated immediately by the appropriate agencies. For the purposes of this subdivision, the licenses that are subject to suspension under this subdivision are all licenses that are held by the employer specific to the business location where the unauthorized alien performed work. If the employer does not hold a license specific to the business location where the unauthorized alien performed work, but a license is necessary to operate the employer's business in general, the licenses that are subject to suspension under this subdivision are all licenses that are held by the employer at the employer's primary place of business. On receipt of the court's order and notwithstanding any other law, the appropriate agencies shall suspend the licenses according to the court's order. The court shall send a copy of the court's order to the attorney general and the attorney general shall maintain the copy pursuant to subsection G of this section.

(d) May order the appropriate agencies to suspend all licenses described in subdivision (c) of this paragraph that are held by the employer for not to exceed ten business days. The court shall base its decision to suspend under this subdivision on any evidence or information submitted to it during the action for a violation of

this subsection and shall consider the following factors, if relevant:

(i) The number of unauthorized aliens employed by the employer.

(ii) Any prior misconduct by the employer.

(iii) The degree of harm resulting from the violation.

(iv) Whether the employer made good faith efforts to comply with any applicable requirements.

(v) The duration of the violation.

(vi) The role of the directors, officers or principals of the employer in the violation.

(vii) Any other factors the court deems appropriate.

2. For a second violation, as described in paragraph 3 of this subsection, the court shall order the appropriate agencies to permanently revoke all licenses that are held by the employer specific to the business location where the unauthorized alien performed work. If the employer does not hold a license specific to the business location where the unauthorized alien performed work, but a license is necessary to operate the employer's business in general, the court shall order the appropriate agencies to permanently revoke all licenses that are held by the employer at the employer's primary place of business. On receipt of the order and notwithstanding any other law, the appropriate agencies shall immediately revoke the licenses.

3. The violation shall be considered:

(a) A first violation by an employer at a business location if the violation did not occur during a probationary period ordered by the court under this subsection or § 23-212.01, subsection F for that employer's business location.

(b) A second violation by an employer at a business location if the violation occurred during a probationary period ordered by the court under this subsection or § 23-212.01, subsection F for that employer's business location.

G. The attorney general shall maintain copies of court orders that are received pursuant to subsection F of this section and shall maintain a database of the employers and business locations that have a first violation of subsection A of this section and make the court orders available on the attorney general's website.

H. On determining whether an employee is an unauthorized alien, the court shall consider only the federal government's determination pursuant to 8 United States Code § 1373(c). The federal government's determination creates a rebuttable presumption of the employee's lawful status. The court may take judicial notice of the federal government's determination and may request the federal government to provide automated or testimonial verification pursuant to 8 United States Code § 1373(c).

I. For the purposes of this section, proof of verifying the employment authorization of an employee through the e-verify program creates a rebuttable presumption that an employer did not knowingly employ an unauthorized alien.

J. For the purposes of this section, an employer that establishes that it has complied in good faith with the requirements of 8 United States Code section 1324a(b) establishes an affirmative defense that the employer did not knowingly employ an unauthorized alien. An employer is considered to have complied with the requirements of 8 United States Code § 1324a(b), notwithstanding an isolated, sporadic or accidental technical or procedural failure to meet the requirements, if there is a good faith attempt to comply with the requirements.

Ariz. Rev. Stat. § 23-212.01. Intentionally employing unauthorized aliens; prohibition; false and frivolous complaints; violation; classification; license suspension and revocation; affirmative defense

A. An employer shall not intentionally employ an unauthorized alien. If, in the case when an employer uses a contract, subcontract or other independent contractor agreement to obtain the labor of an alien in this state, the employer intentionally contracts with an unauthorized alien or with a person who employs or contracts with an unauthorized alien to perform the labor, the employer violates this subsection.

B. The attorney general shall prescribe a complaint form for a person to allege a violation of subsection A of this section. The complainant shall not be required to list the complainant's social security number on the complaint form or to have the complaint form notarized. On receipt of a complaint on a prescribed complaint form that an employer allegedly intentionally employs an unauthorized alien, the attorney general or county attorney shall investigate whether the employer has violated subsection A of this section. If a complaint is received but is not submitted on a prescribed complaint form, the attorney general or county attorney may investigate whether the employer has violated subsection A of this section. This subsection shall not be construed to prohibit the filing of anonymous complaints that are not submitted on a prescribed complaint form. The attorney general or county attorney shall not investigate complaints that are based solely on race, color or national origin. A complaint that is submitted to a county attorney shall be submitted to the county attorney in

the county in which the alleged unauthorized alien is or was employed by the employer. The county sheriff or any other local law enforcement agency may assist in investigating a complaint. When investigating a complaint, the attorney general or county attorney shall verify the work authorization of the alleged unauthorized alien with the federal government pursuant to 8 United States Code § 1373(c). A state, county or local official shall not attempt to independently make a final determination on whether an alien is authorized to work in the United States. An alien's immigration status or work authorization status shall be verified with the federal government pursuant to 8 United States Code § 1373(c). A person who knowingly files a false and frivolous complaint under this subsection is guilty of a class 3 misdemeanor.

C. If, after an investigation, the attorney general or county attorney determines that the complaint is not false and frivolous:

1. The attorney general or county attorney shall notify the United States immigration and customs enforcement of the unauthorized alien.

2. The attorney general or county attorney shall notify the local law enforcement agency of the unauthorized alien.

3. The attorney general shall notify the appropriate county attorney to bring an action pursuant to subsection D of this section if the complaint was originally filed with the attorney general.

D. An action for a violation of subsection A of this section shall be brought against the employer by the county attorney in the county where the unauthorized alien employee is or was employed by the

employer. The county attorney shall not bring an action against any employer for any violation of subsection A of this section that occurs before January 1, 2008. A second violation of this section shall be based only on an unauthorized alien who is or was employed by the employer after an action has been brought for a violation of subsection A of this section or § 23-212, subsection A.

E. For any action in superior court under this section, the court shall expedite the action, including assigning the hearing at the earliest practicable date.

F. On a finding of a violation of subsection A of this section:

1. For a first violation, as described in paragraph 3 of this subsection, the court shall:

(a) Order the employer to terminate the employment of all unauthorized aliens.

(b) Order the employer to be subject to a five year probationary period for the business location where the unauthorized alien performed work. During the probationary period the employer shall file quarterly reports in the form provided in § 23-722.01 with the county attorney of each new employee who is hired by the employer at the business location where the unauthorized alien performed work.

(c) Order the appropriate agencies to suspend all licenses described in subdivision (d) of this paragraph that are held by the employer for a minimum of ten days. The court shall base its decision on the length of the suspension under this subdivision on any evidence or information submitted to it during the action for a violation of

this subsection and shall consider the following factors, if relevant:

(i) The number of unauthorized aliens employed by the employer.

(ii) Any prior misconduct by the employer.

(iii) The degree of harm resulting from the violation.

(iv) Whether the employer made good faith efforts to comply with any applicable requirements.

(v) The duration of the violation.

(vi) The role of the directors, officers or principals of the employer in the violation.

(vii) Any other factors the court deems appropriate.

(d) Order the employer to file a signed sworn affidavit with the county attorney. The affidavit shall state that the employer has terminated the employment of all unauthorized aliens in this state and that the employer will not intentionally or knowingly employ an unauthorized alien in this state. The court shall order the appropriate agencies to suspend all licenses subject to this subdivision that are held by the employer if the employer fails to file a signed sworn affidavit with the county attorney within three business days after the order is issued. All licenses that are suspended under this subdivision for failing to file a signed sworn affidavit shall remain suspended until the employer files a signed sworn affidavit with the county attorney. For the purposes of this subdivision, the licenses that are subject to suspension under this subdivision are

all licenses that are held by the employer specific to the business location where the unauthorized alien performed work. If the employer does not hold a license specific to the business location where the unauthorized alien performed work, but a license is necessary to operate the employer's business in general, the licenses that are subject to suspension under this subdivision are all licenses that are held by the employer at the employer's primary place of business. On receipt of the court's order and notwithstanding any other law, the appropriate agencies shall suspend the licenses according to the court's order. The court shall send a copy of the court's order to the attorney general and the attorney general shall maintain the copy pursuant to subsection G of this section.

2. For a second violation, as described in paragraph 3 of this subsection, the court shall order the appropriate agencies to permanently revoke all licenses that are held by the employer specific to the business location where the unauthorized alien performed work. If the employer does not hold a license specific to the business location where the unauthorized alien performed work, but a license is necessary to operate the employer's business in general, the court shall order the appropriate agencies to permanently revoke all licenses that are held by the employer at the employer's primary place of business. On receipt of the order and notwithstanding any other law, the appropriate agencies shall immediately revoke the licenses.

3. The violation shall be considered:

(a) A first violation by an employer at a business location if the violation did not occur during a

probationary period ordered by the court under this subsection or § 23-212, subsection F for that employer's business location.

(b) A second violation by an employer at a business location if the violation occurred during a probationary period ordered by the court under this subsection or § 23-212, subsection F for that employer's business location.

G. The attorney general shall maintain copies of court orders that are received pursuant to subsection F of this section and shall maintain a database of the employers and business locations that have a first violation of subsection A of this section and make the court orders available on the attorney general's website.

H. On determining whether an employee is an unauthorized alien, the court shall consider only the federal government's determination pursuant to 8 United States Code § 1373(c). The federal government's determination creates a rebuttable presumption of the employee's lawful status. The court may take judicial notice of the federal government's determination and may request the federal government to provide automated or testimonial verification pursuant to 8 United States Code § 1373(c).

I. For the purposes of this section, proof of verifying the employment authorization of an employee through the e-verify program creates a rebuttable presumption that an employer did not intentionally employ an unauthorized alien.

J. For the purposes of this section, an employer that establishes that it has complied in good faith with the requirements of 8 United States Code § 1324a(b) establishes an affirmative defense that the employer

did not intentionally employ an unauthorized alien. An employer is considered to have complied with the requirements of 8 United States Code § 1324a(b), notwithstanding an isolated, sporadic or accidental technical or procedural failure to meet the requirements, if there is a good faith attempt to comply with the requirements.

Ariz. Rev. Stat. § 23-213. Employer actions; federal or state law compliance

This article shall not be construed to require an employer to take any action that the employer believes in good faith would violate federal or state law.

Ariz. Rev. Stat. § 23-214. Verification of employment eligibility; e-verify program; economic development incentives; list of registered employers

A. After December 31, 2007, every employer, after hiring an employee, shall verify the employment eligibility of the employee through the e-verify program.

B. In addition to any other requirement for an employer to receive an economic development incentive from a government entity, the employer shall register with and participate in the e-verify program. Before receiving the economic development incentive, the employer shall provide proof to the government entity that the employer is registered with and is participating in the e-verify program. If the government entity determines that the employer is not complying with this subsection, the government entity shall notify the employer by certified mail of the government entity's determination of noncompliance and the employer's right to appeal the determination. On a final determination of noncompliance, the employer shall repay all monies received as an economic development incentive to the government entity within thirty days of the final determination. For the purposes of this subsection:

1. "Economic development incentive" means any grant, loan or performance-based incentive from any government entity that is awarded after September 30, 2008. Economic development incentive does not include any tax provision under title 42 or 43.

2. "Government entity" means this state and any political subdivision of this state that receives and uses tax revenues.

C. Every three months the attorney general shall request from the United States department of homel-

and security a list of employers from this state that are registered with the e-verify program. On receipt of the list of employers, the attorney general shall make the list available on the attorney general's website.

Ariz. Rev. Stat. § 23-215. Voluntary employer enhanced compliance program; program termination

A. The attorney general shall establish the voluntary employer enhanced compliance program. The program is voluntary and an employer is not required to enroll in the program.

B. An employer that is on probation under § 23-212 or 23-212.01 may not enroll in the voluntary employer enhanced compliance program. A court shall not consider nonenrollment in the voluntary employer enhanced compliance program as a factor when determining whether to suspend or revoke a license under § 23-212 or 23-212.01.

C. To enroll in the voluntary employer enhanced compliance program, an employer shall submit a signed sworn affidavit to the attorney general. The affidavit shall state that the employer agrees to perform all of the following actions in good faith:

1. After hiring an employee, the employer shall verify the employment eligibility of the employee through the e-verify program.

2. To ensure the accuracy of reporting wages to the social security administration, the employer shall verify the accuracy of social security numbers through the social security number verification service for any employee who is not verified through the e-verify program. Within thirty days after enrolling in the voluntary employer enhanced compliance program, the employer shall submit the necessary information to the social security number verification service, including the full name, the social security number, the date of birth and the gender of each employee. On receipt of a failed verification result, the employer shall notify the

employee of the date on which the employer received the failed result and instruct the employee to resolve the discrepancy with the social security administration within ninety days after that date. The employer and employee shall resolve any failed result within ninety days after the date on which the employer received the failed result. If the failed result is not resolved within the ninety-day period but the employer and employee are continuing to actively and consistently work toward resolving the failed result with the social security administration, the ninety-day period does not apply as long as the employer and employee have documented proof of these ongoing efforts to resolve the failed result in good faith and have provided the documented proof to the attorney general. The employer shall verify the accuracy of the social security numbers and resolve any failed verification results in a consistent manner for all employees.

3. In response to a written request by the attorney general or county attorney stating the name of an employee for whom a complaint has been received under § 23-212 or 23-212.01, the employer shall provide the attorney general or county attorney the documents indicating that the employee was verified through the e-verify program or that the accuracy of the employee's wage report was verified through the social security number verification service under this section.

D. An employer that is enrolled in the voluntary employer enhanced compliance program shall not be in violation of § 23-212, subsection A or § 23-212.01, subsection A regarding an employee named in a complaint under § 23-212 or 23-212.01 if the employer has completed both of the following:

1. In good faith verified the employment eligibility of the employee named in the complaint through the e-verify program or in good faith verified the accuracy of the social security number of the employee named in the complaint through the social security number verification system as required by subsection C, paragraphs 1 and 2 of this section.

2. Provided the attorney general or county attorney with the documents, as required by subsection C, paragraph 3 of this section, indicating that the employer verified the employee named in the complaint.

E. The attorney general shall maintain a list of employers enrolled in the voluntary employer enhanced compliance program and make the list available on the attorney general's website.

F. The attorney general shall develop a form of recognition that an employer may display to the general public for enrolling in the voluntary employer enhanced compliance program.

G. If an employer does not fully comply with this section, the attorney general shall terminate the employer's enrollment in the voluntary employer enhanced compliance program. At any time, an employer may voluntarily withdraw from the voluntary employer enhanced compliance program by notifying the attorney general. Beginning on the date of termination or withdrawal, subsection D of this section no longer applies to the employer and the employer shall immediately remove any form of recognition from public display that is authorized under this section.

H. The program established by this section ends on July 1, 2018 pursuant to § 41-3102.

Ariz. Rev. Stat. § 23-216. Independent contractors; applicability

For the purposes of this article, independent contractor status applies to an individual who performs services and is not an employee pursuant to § 3508 of the internal revenue code.

OPPOSITION BRIEF

No. 09-115

SUPREME COURT, U.S.
FILED
SEP 24 2009
OFFICE OF THE CLERK

In The Supreme Court of the United States

CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA, *et al.*,

Petitioners,

vs.

CRISS CANDELARIA, *et al.*,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Does federal law preempt Arizona's laws establishing the sanctions to be imposed against the licenses of employers that knowingly or intentionally hire unauthorized aliens, given that 8 U.S.C. § 1324a(h)(2) specifically permits state sanctions for such conduct "through licensing or similar laws"?

2. Does Arizona's statute requiring Arizona employers to use the federal E-Verify program to confirm that new employees are legally authorized to work in the United States conflict with federal law because Congress has not mandated the use of this federal program for employers nationally?

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INTRODUCTION

This case presents two narrow preemption questions that the lower courts correctly resolved by applying this Court's precedent and the relevant statutory language. This Court should deny the Petition for Certiorari in this case because there is no circuit split to resolve, the lower courts correctly resolved the issues that the case presents, and Petitioners' concerns about immigration policy are more appropriately directed to Congress than to this Court.

First, Petitioners challenge the validity of Arizona's law establishing sanctions against employers that knowingly or intentionally employ unauthorized aliens. Pet. at 20-25. Arizona's law provides for the suspension and revocation of state licenses of employers that engage in that unlawful conduct. As the Ninth Circuit correctly concluded, federal law does not preempt these state sanctions because in the Immigration Reform and Control Act of 1986 (IRCA) Congress expressly permitted states to impose sanctions through "licensing and similar laws," although it preempted other state civil and criminal sanctions. 8 U.S.C. § 1324a(h)(2).

Second, Petitioners challenge Arizona's requirement that employers within the State use the federal E-Verify program to confirm whether their new employees are authorized to work in this country. Pet. at 25-28. E-Verify is an internet-based verification system that the U.S. Citizenship and Immigration Service (USCIS) operates in partnership with the

Social Security Administration. Congress initially authorized it as a limited pilot program and then made it available nationally to improve the process for confirming that employees may lawfully work in this country. It provides an online link to federal databases that allows employers to confirm electronically that newly hired employees are eligible to work in this country. Although Congress prohibited the federal government from requiring employers throughout the country to use E-Verify, it did not prohibit state policymakers from requiring employers within their jurisdiction to use this federal program. The lower courts correctly concluded that federal law does not preempt Arizona's E-Verify requirement, noting that Arizona's requirement supports the federal government's objective of expanding E-Verify's use. Pet. App. at 21a.

Petitioners' concern about a "crazy-quilt of state and local immigration statutes" and the burdens that they impose on employers is unwarranted. Pet. at 4. Arizona's sanctions statute does not impose any new obligations on employers because IRCA's federal-law provisions already prohibit employers from knowingly employing unauthorized aliens. 8 U.S.C. § 1324a. Arizona's law merely establishes state sanctions for that illegal conduct, as Congress specifically permits states to do in 8 U.S.C. § 1324a(h)(2). In addition, Arizona's E-Verify provision simply requires Arizona employers to participate in a congressionally authorized federal program that is already available nationwide.

The interest of Petitioners and their amici in the issues presented in this case reflects immigration's importance as a public-policy issue in this country. Although no one disputes the general importance of immigration policy, that does not mean every dispute about a state or local measure regarding illegal immigrants merits this Court's review. The Ninth Circuit is the only federal court of appeals to have addressed the narrow preemption issues posed by this case, and similar issues are pending in other circuits. This Court's ordinary practice in such a situation is to wait and see whether a circuit conflict arises. Nothing the Solicitor General might say about this case can change that. The Petition should be denied.

STATEMENT OF THE CASE

This case involves a facial challenge to the Legal Arizona Workers Act (the "Act"), A.R.S. §§ 23-211 to 23-214 (Supp. 2007), enacted July 2, 2007. 2007 Ariz. Sess. Laws, ch. 279. Petitioners' lawsuit challenged two provisions in the Act: (1) A.R.S. § 23-212 ("the sanctions statute"), which establishes sanctions against Arizona employers who knowingly or intentionally employ unauthorized aliens and (2) A.R.S. § 23-214 ("the verification statute"), which requires Arizona employers to use the federal E-Verify

program to confirm that new employees are authorized to work in this country.[1]

A. Arizona's Statutes Providing for Sanctions Against Employers that Knowingly or Intentionally Employ Unauthorized Aliens.

Arizona's Legislature crafted its statute authorizing sanctions against employers that knowingly or intentionally employ unauthorized aliens to fall within IRCA's provision that preserves state authority to impose sanctions "through licensing and similar laws," 8 U.S.C. § 1324a(h)(2). As enacted in 2007, the sanctions statute established that employers "shall not intentionally employ an unauthorized alien or knowingly employ an unauthorized alien," and set forth various sanctions to be imposed against an employer's business license for violations of the statute. A.R.S. § 23-212(A) (as enacted in 2007 Ariz. Sess. Laws, ch. 279). The Act defines "license" to

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[1] The Arizona Legislature amended the Act in May 2008 while this case was pending in the Ninth Circuit. 2008 Ariz. Sess. Laws, ch. 152. The Arizona statutes included in Appendix F to the Petition reflect the law 2008 amendments. One of the 2008 amendments separated the sanctions statute, A.R.S. § 23-212, into two separate statutes. It limited A.R.S. § 23-212 to sanctions for knowingly employing unauthorized aliens, and it added A.R.S. § 23-212.01, which addresses sanctions for intentionally employing unauthorized aliens. This response will generally cite only to A.R.S. § 23-212 and will refer to that as the sanctions statute, but will include a specific citation to A.R.S. § 23-212.01 if necessary because of the context.

include "any agency permit, certificate, approval, registration, charter or similar form of authorization that is required by law and that is issued by any agency for the purposes of operating a business in this state," A.R.S. § 23-211(9)(a), and expressly includes articles of incorporation, certificates of partnership, and foreign corporation registrations in the definition, A.R.S. § 23-211(9)(b). It also incorporates the definitions of "knowingly employ" and "unauthorized alien" that IRCA sets forth at 8 U.S.C. § 1324a and § 1324a(h)(3), respectively. A.R.S. § 23-211(8) and (11).

The Arizona Attorney General and the county attorneys investigate complaints alleging that an employer has knowingly or intentionally employed an unauthorized alien, A.R.S. § 23-212(B), but only county attorneys may bring enforcement actions to impose sanctions against an employer, A.R.S. §§ 23-212(C)(3), 23-212(D). To investigate complaints, state officials request information from the federal government pursuant to 8 U.S.C. § 1373(c)[7] and the county attorneys must use the information that the federal government provides to establish work authorization

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[7] Communication between federal immigration agencies and state and local governments are addressed in 8 U.S.C. § 1373. Subsection (c) requires the USCIS to "respond to an inquiry by a Federal, State, or local government agency, seeking to verify or ascertain the citizenship or immigration status of any individual within the jurisdiction of the agency for any purpose authorized by law, by providing the requested verification or status information."

status in any enforcement action that is filed under the sanctions statute. A.R.S. § 23-212(B), (H). A court may impose sanctions only after it has determined that the employer "intentionally" or "knowingly" employed an unauthorized alien. A.R.S. §§ 23-212(F), -212.01(F). The Act creates a rebuttable presumption in enforcement actions that employers that have used E-Verify have not violated the law. A.R.S. § 23-212(I). And, as is true in federal enforcement actions, employers have an affirmative defense if they have "complied in good faith" with the I-9 system for verifying that employees are authorized to work in this country. A.R.S. § 23-212(J); 8 U.S.C. § 1324a(b)(6).

Arizona's law creates a graduated penalty scheme. For a first adjudicated knowing violation during a three-year period, the court must order the employer to terminate the employment of all unauthorized aliens, to file quarterly reports of new hires for a three-year probation period, and to file an affidavit within three days that it has terminated all unauthorized aliens and that it will not intentionally or knowingly employ an unauthorized alien. A.R.S. § 23-212(F)(1)(a)-(c). If the employer fails to file the affidavit on time, its business licenses will be suspended until it does. A.R.S. § 23-212(F)(1)(c). The court also may suspend an employer's business licenses for up to ten days after considering various factors, such as the number of unauthorized aliens employed, prior misconduct, and the degree of harm resulting from the violation. A.R.S. § 23-212(F)(1)(d).

For a first adjudicated intentional violation during a five-year period, the sanctions are the same except that the probation and reporting period is five years and the suspension of business licenses for a minimum of ten days is mandatory. A.R.S. § 23-212.01(F)(1). For a second adjudicated knowing or intentional violation during the probation period, the Court must permanently revoke an employer's business license. A.R.S. §§ 23-212(F)(2), -212.01(F)(3). An employer found to have violated the sanctions statute may exercise the same appeal rights that exist for other litigants in civil actions.

B. Arizona's Requirement that Employers Use E-Verify.

The Act requires Arizona employers to use the federal government's E-Verify program (formerly known as the Basic Pilot program) to confirm that any newly hired employees are authorized to work in this country. A.R.S. § 23-214. It does not impose any penalty on employers that fail to use the program.[3]

Congress established the E-Verify program in 1996 pursuant to the Illegal Immigration Reform and

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[3] The 2008 amendments to the Act, which were not at issue in this case, added subsections B and C to A.R.S. § 23-214. Subsection B addresses employers that receive an economic development incentive from state of local governments, and subsection C requires the Arizona Attorney General to post a list of Arizona employers participating in the E-Verify program on the Attorney General's website.

Immigrant Responsibility Act of 1996 (IIRIRA). Pub. L. No. 104-208, §§ 401 to 404, 110 Stat. 3009, 3009-655 to 3009-666. E-Verify is designed to provide employers with a more accurate and efficient way to verify their employees eligibility to work in this country while protecting employee rights. *See* Westat INS Basic Pilot Evaluation Summary Report (Jan. 2002), Dkt. 148, Ex. 10 at 5. Although initially available in only five of the seven States with the largest population of unauthorized aliens, E-Verify is now available in all fifty States, the District of Columbia, Puerto Rico, Guam and the U.S. Virgin Islands. *See* Basic Pilot Program Extension and Expansion Act of 2003, Pub. L. No. 108-156, 117 Stat. 1944, 1944. It provides an online link to federal databases that allows employers to verify the employment eligibility of newly hired employees. USCIS, *I Am an Employer . . . How Do I . . . Use E-Verify?* (Form M-655 8/08), available at http://www.uscis.gov/files/article/E4eng.pdf (last visited Sept. 16, 2009). Access to E-Verify is free. *Id.*

The system electronically compares information that the employee submits on the Employment Eligibility Verification Form I-9 with records of the SSA and the Department of Homeland Security (DHS). *See* USCIS, E-Verify User Manual (Form M-574 9/07), Dkt. 148, Ex. 8 at 1. If the information in the database confirms that the person is authorized to work in this country, the employer promptly receives a message to that effect. If the information does not confirm that the person is authorized to work in this

country, the program provides a "tentative non-confirmation" notice, and the employee must follow up with the appropriate federal agencies to resolve the problem. *See id.* at 9-25. According to the USCIS, "E-Verify is currently the best means available for employers to verify electronically the employment eligibility of their newly hired employees. E-Verify virtually eliminates Social Security mismatch letters, improves the accuracy of wage and tax reporting, protects jobs for authorized U.S. workers, and helps U.S. employers maintain a legal workforce." USCIS, *I Am an Employer . . . How Do I . . . Use E-Verify?* (Form M-655, 8/08), available at http://www.uscis.gov/files/article/E4eng.pdf (last visited Sept. 16, 2009).

C. Procedural Background

Petitioners separately filed lawsuits challenging the Act on July 13, 2007 (CV07-01335, Dkt. 1) and September 4, 2007 (CV07-01684, Dkt. 1), only a few weeks after former Arizona Governor Janet Napolitano signed the measure into law and well before the January 1, 2008, effective date of the E-Verify requirement and the sanctions statute. The defendants in these consolidated actions were Arizona's Governor, Attorney General, and the Director of the Arizona Department of Revenue. The district court consolidated these actions (CV07-01335, Dkt. 39) and subsequently dismissed them for lack of subject matter jurisdiction. Pet. App. at 126a. The court concluded that there was no justiciable controversy against the named defendants because none of them enforced the

Act. Pet. App. at 98a. In the first lawsuits, Petitioners failed to include the county attorneys as named defendants, and only county attorneys may bring enforcement actions under the sanctions statute. Pet. App. at 126a. Petitioners appealed the district court's decision to the Ninth Circuit and also promptly filed new lawsuits in district court naming Arizona's county attorneys as defendants as well as state officials Arizona Attorney General Terry Goddard, and the Registrar of Contractors. CV07-02496, Dkt. 1; CV07-02518, Dkt. 1.

The parties to the new lawsuits agreed to an expedited trial of the matter on January 14, 2008, based on stipulated facts and written evidence to be jointly submitted to the court. CV07-02496, Dkt. 155. On February 7, 2008, the district court ruled on the merits that (1) IRCA did not expressly preempt the Act because the savings clause specifically authorized licensing sanctions such as those in the Act; (2) Congress did not occupy the field of licensing sanctions for employers of unauthorized aliens; (3) the Act does not regulate immigration; (4) the sanctions and the E-Verify requirement do not conflict with or impede Congress's purposes and objectives; (5) the Act provides due process to employers charged under the sanctions statute; and (6) the Act does not violate the Commerce Clause because it does not regulate employees completely outside of Arizona. Pet. App. at 51a-94a. Plaintiffs appealed this ruling to the Ninth Circuit.

The Ninth Circuit affirmed the district court's decision in both appeals. Pet. App. at 31a. Petitioners

requested an en banc rehearing, and the court denied their request and also issued a modified opinion affirming the district court's decision on March 9, 2009. Pet. App. 5a-25a. The Ninth Circuit concurred with the district court that IRCA did not preempt the sanctions statute because it constituted "a 'licensing' measure that falls within the savings clause of IRCA's preemption provision." Pet. App. at 19a. The Ninth Circuit similarly rejected Petitioners' claims that the Act's mandate that employers use E-Verify obstructed congressional objectives. The court noted that "Congress plainly envisioned and endorsed an increase in [E-Verify's] usage" and that the verification statute "is consistent with and furthers this purpose, and thus does not raise conflict preemption concerns." Pet. App. at 21a. The court also disposed of Petitioners' due process claim – which they have not raised as an issue before this Court – and noted that the Act provided employers a meaningful opportunity to be heard before a court prior to sanctions being imposed. Pet. App. at 25a.

REASONS TO DENY THE PETITION

In the absence of a circuit split, Petitioners are left to argue that the Ninth Circuit decision was wrong and that, although this Court does not usually grant certiorari to correct lower court errors, it should do so in this case because of the importance of the issue. Petitioners' starting premise is correct: there is no circuit conflict and only time will tell whether one will arise. But Petitioners are wrong in arguing that

the Ninth Circuit decision is erroneous and that error-correction review is appropriate in this case. The Ninth Circuit faithfully applied the plain language of IRCA and well-established preemption doctrine. There is no pressing need for this Court's intervention.

I. The Ninth Circuit Correctly Construed the Savings Clause in 8 U.S.C. § 1324a(h)(2) and Correctly Rejected Petitioners' Implied Preemption Arguments.

A. Preemption and Employer Sanctions.

The Ninth Circuit is the first court of appeals to address IRCA's language in 8 U.S.C. § 1324a(h)(2) preserving State authority to impose sanctions "through licensing and similar laws" against businesses that employ unauthorized aliens. As the lower courts correctly concluded, Arizona's sanctions fall within the parameters that Congress expressly established in this IRCA provision.

The lower courts' conclusion that federal law did not preempt Arizona's sanctions statute is consistent with this Court's precedent and IRCA's language in 8 U.S.C. § 1324a(h)(2). The federal government undeniably has the authority to preempt state laws imposing sanctions against employers that hire unauthorized workers, but it has not preempted the sanctions that Arizona's statute authorized. In *DeCanas v. Bica,* 424 U.S. 351 (1976), which this Court decided ten years before IRCA's enactment, the

Court upheld a California statute that established criminal penalties against employers that knowingly employed "an alien who is not entitled to lawful residence in the United States if such employment would have an adverse effect on lawful resident workers." *Id.* at 352. The Court noted that the "[p]ower to regulate immigration is unquestionably exclusively a federal power [b]ut the Court has never held that every state enactment which in any way deals with aliens is . . . per se pre-empted." *Id.* at 354-55 (citations omitted).

When Congress later adopted a federal employer sanctions scheme in IRCA in 1986, it specifically addressed state authority to adopt sanctions:

> The provisions of this section preempt any State or local law imposing civil or criminal sanctions (*other than through licensing and similar laws*) upon those who employ, or recruit or refer for a fee for employment, unauthorized aliens.

8 U.S.C. § 1324a(h)(2) (emphasis added). The Ninth Circuit correctly concluded that Arizona's sanctions statute, which imposes sanctions against licenses, is not preempted because it falls within IRCA's savings clause for "licensing and similar laws."

Petitioners wrongly argue that the Ninth Circuit's analysis is contrary to this Court's decision in *Hoffman Plastic Compounds, Inc. v. NLRB,* 535 U.S. 137, 146-47 (2002). Pet. at 21. In *Hoffman*, this Court addressed whether the NLRB could issue a remedial order for a violation of the National Labor Relations

Act that "awarded backpay to an undocumented alien who has never been legally authorized to work in the United States." *Hoffman,* 535 U.S. at 140. The case harmonizes two federal laws – the National Labor Relations Act and IRCA. *Id.* at 147-49. *Hoffman* appropriately recognized that, under IRCA, combating the employment of unauthorized workers is "central to [t]he policy of immigration law." *Id.* (Internal quotation marks omitted.) But *Hoffman* does not address federal preemption of a state law or analyze 8 U.S.C. § 1324a(h)(2). As the Ninth Circuit recognized, the question that the Court resolved in *Hoffman* is quite different from the one presented here.

Nonetheless, Petitioners cite the case in support of their field preemption argument. Pet. at 20. But field preemption requires a demonstration that a "complete ouster of state power" was "the clear and manifest purpose of Congress." *DeCanas,* 424 U.S. at 357 (quoting *Fla. Lime & Avocado Growers v. Paul*, 373 U.S. 132, 146 (1963)). And the mere fact that Congress enacted a detailed and comprehensive scheme to regulate a complex area of law does not demonstrate legislative intent to oust state authority. *DeCanas,* 424 U.S. at 359-60; *see also N.Y. Dep't of Social Servs. v. Dublino*, 413 U.S. 405, 415 (1973) ("Given the complexity of the matter addressed by Congress [related to welfare benefits] . . . , a detailed statutory scheme was both likely and appropriate, completely apart from any questions of pre-emptive intent."). The explicit authorization for state sanctions "through licensing and similar laws" establishes that

Congress did not completely oust state authority when it enacted IRCA. *See* 8 U.S.C. § 1324a(h)(2). Although IRCA is a comprehensive federal scheme, it expressly does not preclude all state authority to sanction employers that knowingly or intentionally employ unauthorized workers. Therefore, there is no field preemption of state sanctions, and the question in this case, which the Ninth Circuit correctly resolved, is whether Arizona's sanctions statute falls within the savings clause in 8 U.S.C. § 1324a(h)(2).

Petitioners incorrectly assert that Arizona's definition of "license" exceeds IRCA's savings clause for state sanctions "through licensing and similar laws." They assert that IRCA should apply only to "licensing in the traditional sense," which they characterize as involving "a genuine qualification to do business, such as a professional certification or permit." Pet. at 24. But Section 1324a(h)(2)'s language does not support such a limited application. As the Ninth Circuit observed, the sanctions statute's definition is consistent with the traditional definition of the term "license" as "a permission, usually revocable, to commit some act that would otherwise be unlawful." Pet. App. at 17a. IRCA's reference to state sanctions through "licensing *and similar laws*" also indicates that the savings clause is not tied to a limited definition of license. If Congress had intended to limit the savings clause to professional certifications or some other specific type of license, it could have done so.

The Ninth Circuit also correctly rejected Petitioners' argument that state sanctions may be imposed

against an employer only after there has been a federal adjudication of an IRCA violation. Pet. App. at 17a-19a. The IRCA savings clause preserves state sanctions "through licensing and similar laws . . . upon those who employ, or recruit or refer for a fee for employment, unauthorized aliens." 8 U.S.C. § 1324a(h)(2). Nothing in this language makes a federal enforcement action under IRCA a prerequisite to the state's imposition of sanctions against the license of a business that knowingly or intentionally employs unauthorized aliens. Nor does any other IRCA provision require that the determination that an entity has unlawfully employed an unauthorized alien be made exclusively "by federal officials, in specialized administrative proceedings conducted under federal rules and regulations" as Petitioners allege. Pet. at 23.[4] This Court has established that

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[4] Petitioners attempt to buttress their argument by citing IRCA's interaction with the Migrant and Seasonal Agricultural Worker Protection Act (AWPA), 29 U.S.C. § 1801, *et seq.*, as the model Congress intended for states to use in imposing sanctions under IRCA. Pet. at 24. This provision merely authorizes the Secretary of Labor to suspend, revoke or refuse to issue a federal certificate of registration if an employer has been found to violate IRCA. 29 U.S.C. § 1813(a)(6). The AWPA does not address the preemptive effect of IRCA in the context of state sanction proceedings under the savings clause. Indeed, to the extent the AWPA touches upon state law, it demonstrates Congress's respect for the states' traditional authority in regulating employment by stating that the Federal law is "intended to supplement State law, and compliance with this chapter shall not excuse any person from compliance with appropriate State law and regulation." 29 U.S.C. § 1871.

state courts generally have the authority to resolve questions that involve either state or federal law unless federal law precludes them from doing so. *See, e.g., Tafflin v. Levitt,* 493 U.S. 455, 458 (1990) (deciding that state courts have jurisdiction to decide federal RICO claims).

Petitioners contend that legislative history shows that Congress intended state sanctions against an employer to be "tack[ed] on" to federal sanctions after a federal adjudication has occurred (Pet. at 23) based primarily on its interpretation of language in a House report regarding "persons who ha[ve] been found to have violated the sanctions provisions in this legislation." Pet. at 24. However, the statute's plain and unambiguous language, not its legislative history, controls the analysis. *Exxon Mobil Corp. v. Allapattah Servs., Inc.*, 545 U.S. 546, 568 (2005) (the "authoritative statement is the statutory text, not the legislative history"). Even so, the lower courts correctly noted that the legislative history itself contradicts Petitioners' interpretation because it "recognizes states can condition an employer's 'fitness to do business' on hiring documented workers." Pet. App. at 18a. Thus, the Ninth Circuit correctly concluded that a federal adjudication under IRCA need not precede a state enforcement action against an employers' license.

Petitioners argue that Arizona's sanctions statute undermines the uniformity that Congress desired and imposes burdens on employers. But as the Ninth Circuit observed, Arizona's sanctions statute "is

premised on enforcement of federal standards as embodied in federal immigration law." Pet. App. at 19a. Arizona uses the federal definition of "unauthorized alien," A.R.S. § 23-211(11), and county attorneys may rely only on information from the federal government to establish an employee's immigration status in any enforcement proceeding A.R.S. § 23-212. Arizona's law does not impose any new obligation on employers because, since IRCA's enactment in 1986, federal law has prohibited them from employing unauthorized aliens. Arizona's law simply provides for the type of state sanctions that Congress authorized states to impose when it enacted IRCA.

Because this case involves a preenforcement, facial challenge of the Act, it does not address a case in which sanctions against an employer were actually imposed through a state court proceeding. None of the Petitioners has been the subject of any enforcement action, and no enforcement action has been filed against any employer under the Act.

In sum, the lower court correctly resolved the question of whether IRCA preempts Arizona's sanctions statute, and this Court should deny review of that issue.

B. The Ninth Circuit's Analysis of Arizona's E-Verify Requirement Is Consistent with This Court's Precedent and the Relevant Congressional Enactments.

The Ninth Circuit's analysis of whether federal law preempts a state from requiring employers to use the federal E-Verify program is also consistent with this Court's precedent. *See* Pet. App. at 21a. In conducting its conflict preemption analysis, the Ninth Circuit considered whether the E-Verify requirement "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." Pet. App. at 20a (internal quotation marks omitted). The statute creating the E-Verify program provides that the Secretary of Homeland Security cannot "require any person or other entity to participate in a pilot program." IIRIRA, Pub. L. No. 104-208, § 402(a), 110 Stat. 3009-655, 3009-656 (1996). Although Congress prohibited the federal government from making the E-Verify program mandatory, it did not preclude state policymakers from requiring its use.

The Ninth Circuit correctly applied this Court's conflict preemption principles in upholding Arizona's E-Verify requirement. The E-Verify requirement does not create an obstacle to the "full purposes and objectives of Congress" in creating the E-Verify program. *Sprietsma v. Mercury Marine*, 537 U.S. 51, 64 (2002) (internal quotation marks omitted). Petitioners assert that the Ninth Circuit erred because the verification

statute conflicts with Congress's intent to make the E-Verify program a voluntary one. Pet. at 27. But as the Ninth Circuit recognized, Congress's purpose in creating the E-Verify program was to create a more effective verification program. Pet. App. at 9a (noting purpose of IIRIRA to "ensure efficient and accurate verification any new employee's eligibility for employment"). That purpose is furthered if employers use the E-Verify program, as Arizona requires them to do.

In addition, the record in this case included the federal Department of Homeland Security materials illustrating the agency's commitment to improving and expanding the E-Verify program and indicating that the agency was providing technical assistance to assist in state efforts to expand the program. *See* The White House – President George W. Bush, Office of the Press Secretary, *Fact Sheet: Improving Border Security and Immigration Within Existing Law*, CV07-02496, Dkt. 149, Ex. 16 at 3. Federal program evaluations of E-Verify indicated that increased use would enhance the program's effectiveness. *See* Westat, *Findings of the Web Basic Pilot Evaluation* (Sept. 2007), CV07-02496, Dkt. 152, Ex. 52 at xxi-xxii (noting that E-Verify's limited use "place[es] limitations on its effectiveness in preventing unauthorized employment on a national basis"); *id.* at 147 (noting that increasing E-Verify's use enhances its "ability to deter unauthorized employment"). Arizona's E-Verify requirement supports the federal government's efforts to improve the verification process through E-Verify's expanded use.

As the Ninth Circuit correctly concluded, Petitioners' reliance on this Court's decision in *Geier v. American Honda Motor Co., Inc.*, 529 U.S. 861 (2000) to support their conflict preemption argument is misplaced. Pet. App. at 20a-21a. *Geier* dealt with a Department of Transportation (DOT) regulation that gave automobile manufacturers a choice as to which passive restraint systems to use in their cars and required only ten percent of a manufacturer's production to include airbags. *Geier*, 529 U.S. at 879. By allowing this flexibility, the federal government intended to "encourage competition among automobile manufacturers to design effective and convenient passive-restraint systems." Pet. App. at 20a. The Court in *Geier* determined that state tort liability arising from the failure to use airbags would negate the flexibility that the DOT regulation afforded because manufacturers would likely abandon the attempt to develop new passive restraint systems and install airbags in all of their cars to avoid the prospect of tort damages. *Geier*, 529 U.S. at 881. Thus, the federal regulation preempted state tort law because it created an obstacle to the accomplishment of a federal objective. *Id.* at 886.

The Ninth Circuit correctly recognized that unlike the state tort law at issue in *Geier*, Arizona's requirement that employers use E-Verify furthers Congress's objectives. Pet. App. at 21a. The court correctly observed that Congress's actions in extending and expanding the E-Verify program and its availability demonstrate that Congress "plainly

envisioned and endorsed an increase in its usage." *Id.* Rather than undermining the development of federal objectives, as the state law did in *Geier*, Arizona's requirement supports federal goals for the E-Verify program by increasing the number of users and facilitating the federal government's ongoing efforts to expand and improve this electronic verification program. Thus, the Ninth Circuit correctly held that Petitioners' conflict preemption argument fails because Arizona's law is consistent with and furthers the purpose of the E-Verify program. *Id.* This Court should therefore deny review of this decision.

II. There Is No Circuit Split on the Issues That Petitioner Raises in This Case.

As Petitioners concede, no other circuit court has addressed either preemption issue that this case raises.[5] Pet. at 20. At least four other district courts have addressed related issues, but no other circuit court has addressed the preemption issues in question. In *Lozano v. City of Hazleton*, 496 F. Supp. 2d 477 (M.D. Pa. 2007), a district court invalidated a

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[5] Other circuit court decisions have addressed whether IRCA preempts state and local employment and tort law, but those cases did not involve an analysis of 8 U.S.C. § 1324a(h)(2). *See, e.g., Incalza v. Fendi N. Am., Inc.*, 479 F.3d 1005 (9th Cir. 2007) (concluding that IRCA did not preempt California employment law); *Madeira v. Affordable Housing Found., Inc.*, 469 F.3d 219 (2d Cir. 2006) (concluding that IRCA did not preempt New York law governing tort recovery for injured workers).

local ordinance that authorized local sanctions against employers of unauthorized aliens, required employers to use the E-Verify program, and required people seeking to rent apartments to prove their legal status. As Petitioners indicated, that decision is currently on appeal. Pet. at 19; *see Lozano v. City of Hazleton*, 3rd Cir., Dkt. 07-3531. A district court in Oklahoma also granted a preliminary injunction against a state law requiring contractors with public entities to use a "Status Verification System," making it a discriminatory practice to discharge a U.S. citizen while retaining an employee that the employer knows or should have known is an unauthorized alien, and imposing additional tax withholding requirements for employers that fail to use the employment eligibility system. *Chamber of Commerce v. Henry*, No. 08-109, 2008 WL 2329164 at *8 (W.D. Okla. June 4, 2008). That decision has been appealed to the Tenth Circuit. *Chamber of Commerce v. Henry*, 10th Cir., Dkt. 08-6127. Meanwhile, another district court upheld a city ordinance penalizing businesses employing unauthorized aliens against similar claims of preemption. *Gray v. City of Valley Park*, No. 07-00881, 2008 WL 294294 at *31 (E.D. Mo. Jan. 31, 2008), *aff'd on other grounds*, 567 F.3d 976 (8th Cir. 2009). The federal government also successfully challenged an Illinois law that prohibited the use of E-Verify, as the district court in that case concluded that banning participation in the federal program undermined Congressional objectives. *See United States v. Illinois*, No. 07-03261, 2009 WL 662703 (C.D. Ill. March 12, 2009). No appeal was filed in that case.

Thus, related issues are percolating through the lower courts, but there is no circuit split regarding the scope of the preemption provision in 8 U.S.C. § 1324a(h)(2) or preemption of State E-Verify requirements that requires this Court's review.

III. Petitioners Should Direct Their Concerns About State Sanctions and State E-Verify Requirements to Congress.

Petitioners urge this Court to accept this case to avoid the burdens of state regulation and ensure uniform enforcement of our immigration laws. But in 8 U.S.C. § 1324a(h)(2), Congress explicitly preserved state authority to impose sanctions "through licensing and similar laws." Sanctions against a business's license may carry serious consequences, but Congress plainly left states the discretion to provide for such sanctions. Petitioners may disagree with the impact of permitting states to impose sanctions through state licensing laws and may favor more restrictions on state authority, but that is a matter for Congress to address. The lower courts correctly resolved the IRCA preemption issue raised here.

Petitioners also express their concern about the accuracy of the E-Verify program to support their claim that states cannot require employers to use this federal program. But, Congress has demonstrated its confidence in the program by making it available for use nationally, and the Department of Homeland Security continues to strengthen and expand the

program. *See* 48 C.F.R. § 22.1802 (2009) (mandating that federal solicitations and contracts include a provision requiring use of E-Verify for eligibility verification of new employees).[6] Preemption principles permit Arizona's policy makers to assess the benefits and weaknesses of the E-Verify program, consider the policy concerns such as those expressed by Petitioners, and determine whether to require its use by Arizona employers. Arizona is not creating its own verification system. It is merely requiring employers to use a federal program for the purpose for which the federal government developed it – to help ensure that employees are legally authorized to work in this country. Petitioners also suggest Arizona's law may result in increased racial discrimination by employers. Pet. at 17. But that is pure speculation, and other laws at the state and federal levels protect against discrimination. *See* 8 U.S.C. § 1324b (defining and prohibiting unfair immigration-related employment practices); 42 U.S.C. § 2000e-2 (prohibiting discrimination based on "race, color, religion, sex, or national origin"); A.R.S. § 41-1463(B) (prohibiting employment discrimination based on "race, color, religion, sex, age, disability or national origin").

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[6] *See also* Department of Homeland Security, Office of the Press Secretary, *Secretary Napolitano Strengthens Employment Verification with Administration's Commitment to E-Verify* (July 8, 2009), available at http://www.dhs.gov/ynews/releases/pr_1247063976814.shtm (last visited Sept. 17, 2009).

This Court has consistently recognized that, subject to other constitutional restrictions, states have a legitimate interest in addressing the local problems that may be associated with the problem of illegal immigration. *DeCanas,* 424 U.S. at 357; *see also Plyler v. Doe*, 457 U.S. 202, 225 (1982) ("[T]he States do have some authority to act with respect to illegal aliens, at least where such action mirrors federal objectives and furthers a legitimate state goal."). Congress has also recognized that concern by preserving state authority in IRCA (8 U.S.C. § 1324a(h)(2)) and enacting legislation that encourages state and federal cooperation on immigration-related issues, *see, e.g.*, 8 U.S.C. § 1373; 8 U.S.C. § 1644 (prohibiting states and local governments from being prevented from exchanging information with federal authorities regarding the immigration status of individuals). States have a significant interest in addressing the affects of illegal immigration in their communities and may serve as effective laboratories that will inform the national debate concerning immigration policy.

When she approved the Legal Arizona Workers Act, former Arizona Governor Napolitano indicated that the legislation was borne out of frustration with national immigration policy. CV07-02496, Dkt. 148, Ex. 2. The "flood" of state legislation that Petitioners describe may also reflect that frustration. Pet. at 14. But that is not a problem this Court can solve. Indeed, Congress is currently considering bills that would make E-Verify a permanent program, gradually phase-in required usage of E-Verify by all employers,

and require certain contractors to use E-Verify.[7] *See, e.g.*, S.1505, 111th Cong. § 201 (2009); H.R. 2083, 111th Cong. (2009). The most recent customer guide posted on the USCIS website regarding E-Verify also demonstrates federal support for the expanded use of E-Verify through state-mandated use of the program because it encourages employers to "check to see if their state law requires participation in E-Verify." USCIS *I Am an Employer . . . How Do I . . . Use E-Verify?* (Form M-655, 8/08), available at http://www.uscis.gov/files/article/E4eng.pdf (last visited Sept. 16, 2009).

Petitioners claim that only this Court "can provide the clarity and uniformity" necessary to regulate employment of unauthorized aliens. Pet. at 19. They are wrong. The Ninth Circuit provided the correct analysis of the preemption issues that this case raises. Any further "clarity or uniformity" is a matter for Congress, not this Court.

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[7] *See, e.g.*, Andorra Bruno, *Electronic Employment Eligibility Verification*, Congressional Research Service, at 4-5 (March 13, 2009), available at http://www.nilc.org/immsemplymnt/ircaempverif/e-verify-CRS-rpt-2009-03.pdf (last visited Sept. 17, 2009).

CONCLUSION

For the foregoing reasons, this Court should deny the Petition for Writ of Certiorari.

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REPLY BRIEF

Supreme Court, U.S.
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No. 09-115

IN THE

Supreme Court of the United States

CHAMBER OF COMMERCE
OF THE UNITED STATES OF AMERICA *et al.*,
Petitioners,

v.

CRISS CANDELARIA *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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REPLY BRIEF

The Brief in Opposition is most important for what it does not say. Strikingly, respondents do not challenge the fundamental national importance of the issues underlying the Petition. *E.g.*, Opp. 3. They also do not meaningfully dispute the conflict between the decision below and *Hoffman Plastic Compounds, Inc.* v. *NLRB*, 535 U.S. 137 (2002), confining themselves to a cursory repetition of the Ninth Circuit's assertion that *Hoffman* was about displacement of federal regulation rather than preemption of state law. In short, the principal reasons justifying this Court's review are not really contested. Respondents instead devote their Opposition principally to a discussion of the merits. Opp. 12-22. Their arguments on this score are wrong, for the reasons we previously articulated, Pet. 22-27; more fundamentally, they further demonstrate the important and interesting nature of these issues, supporting rather than undermining the case for review.

For all of these reasons, reviewing the decision below is not mere "error-correction." Opp. 13. The recent (and continuing) flood of state and local legislation already is imposing severe burdens on employers and employees alike, and it is those high stakes—not "two narrow preemption questions," *id.* at 1—that amply justify this Court's review. The Petition should be granted.

I. THIS CASE PRESENTS A QUESTION OF EXCEPTIONAL NATIONAL IMPORTANCE.

A. Respondents forthrightly acknowledge the importance of the issues in this case. They recognize "immigration's importance as a public-policy issue in this country" and the "general importance of immi-

gration policy." Opp. 3. They do not disagree that there now exists a cacophony of differing state and local immigration regulations across the country, creating a shadow immigration policy that disrupts the uniform scheme at the heart of federal immigration law. Pet. 2-3 & nn.1-2, 14-17 & nn.7-9; Br. of Business Organizations as *Amici Curiae* 13-20 & nn.3-17. They do not dispute that this fractured system is imposing severe costs—today—on employers, particularly those with multi-state operations. Pet. 17-18; see Business Organizations Br. 7-13, 20-21. And, they also do not gainsay the showing that such legislation imposes costs on employees.[1] This intolerable situation calls out for review, or at least for enlisting the views of the Executive Branch. See 78 U.S.L.W. 3170 (Oct. 5, 2009) (order calling for the views of the Solicitor General in Nos. 08-1515, *Golden Gate Restaurant Ass'n* v. *San Francisco*, and 08-1314, *Williamson* v. *Mazda Motor*, concerning questions of federal preemption).

B. The national scope of this problem cannot be ignored, as respondents suggest, on the theory that only the Arizona statute is directly at issue here. Opp. 2. Common sense dictates—as this Court long has held—that a critical consideration in assessing a case's "importance" for purposes of certiorari review is its potential impact on other cases and parties.

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[1] Pet. 17-18. *See generally* Br. of *Amici Curiae* National Employment Law Project et al.; Br. of *Amici Curiae* Asian American Justice Center et al.

Respondents deride as "pure speculation" that the enactment of such state laws may result in increased discrimination. Opp. 25. This is not "speculation," but the considered policy judgment of Congress, and is confirmed by a report commissioned by the Department of Homeland Security, *see* Pet. 17-18, as the *amici* discuss at length.

E.g., *Nixon* v. *Shrink Mo. Gov't PAC*, 528 U.S. 377, 385 (2000); see Eugene Gressman et al., *Supreme Court Practice* §§ 4.11, 4.13, 6.31(b), at 262-64, 267-70, 479 (9th ed. 2007). This is all the more true where preemption is concerned; after all, approving a particular enactment permits every state and locality to legislate in similar fashion. *See* Pet 11-12.

Here, as respondents do not dispute, thousands of immigration-related bills and resolutions have been introduced in states and localities across the country in recent years, proposing or imposing competing and conflicting requirements on employers and employees, and threatening the "uniform" and "comprehensive" system that Congress envisioned. Pet. 14-17. This case is a good vehicle for addressing these issues because it presents two provisions that are among the most common in such state and local enactments. *Id.* at 4, 19-20, 20-27; *infra* at 6-8. Although of course a decision in this case could invalidate or uphold only the Arizona statute, it would broadly affect the legality of innumerable enactments already on the books. A decision by the Court now will spare litigants and courts the costs of litigating dozens, if not hundreds, of challenges to the existing laws and provide clear guidance to state and local governments about the scope of their powers.

C. The importance of these issues is not reduced because there is no circuit split. See Opp. 22-24. The "importance" of an issue is separate from the question whether courts have divided over it, and can justify review in the absence of any split. See Sup. Ct. R. 10(a), (c); see also Gressman et al., *supra*, §§ 4.11, 4.13, 6.31(b), at 262-64, 267-70, 479. This Court often has granted certiorari to resolve an issue of national importance when there is a divide between lower court decisions, even in the absence of an existing

split among the circuits themselves. See, *e.g.*, *Cook* v. *Gralike*, 531 U.S. 510, 518 (2001); *Murphy Bros., Inc.* v. *Michetti Pipe Stringing, Inc.*, 526 U.S. 344, 349 & n.2 (1999). Here, there is a clear division of authority among at least four district courts that addressed these and related issues, see Pet. 19-20, which respondents do not dispute, cf. Opp. 22-24.

Review by this Court is particularly warranted when, as here, delay is not only unnecessary but in fact poses significant risks. The magnitude of the problems we and the supporting *amici* have described grow more severe with each passing month, as state legislatures and local governments continue to pass conflicting rules concerning employment verification. Further delay will simply engender more litigation and greater uncertainty among courts and state officials. Pet. 18-19.

D. For closely related reasons, there is no merit to respondents' suggestion that "concerns about state sanctions and state E-Verify requirements [should be directed] to Congress" rather than this Court. Opp. 24-27. Congress already has spoken. It established a policy concerning the employment of aliens that it intended to be "comprehensive" and "uniform," *Hoffman*, 535 U.S. at 147; IRCA, Pub. L. No. 99-603, § 115, 100 Stat. 3359, 3384 (1986), including a provision that broadly and expressly preempts state laws like the one at issue here, see 8 U.S.C. § 1324a(h)(2). The question in this case is not whether Congress can or should act—it already has—but the proper interpretation of an existing federal statute. And *that* question, of course, "is the proper and peculiar province of the courts" to answer. *The Federalist* No. 78 (Alexander Hamilton); *Marbury* v. *Madison*, 5 U.S. (1 Cranch) 137, 178 (1803).

Indeed, action in this case is uniquely the domain of this Court. Whether the decision below conflicts with this Court's decision in *Hoffman* is a question for this Court. Pet. 20-22; *infra* at 5-6. On the fundamental preemption question, decisions by lower courts will not provide certainty or needed guidance, and indeed have not done so. Pet. 18-20. And, the prospect of further congressional action is uncertain, nor is there any reason to believe it will address the preemption issue on which Congress already spoke.

II. THE DECISION BELOW CONFLICTS WITH THIS COURT'S DECISION IN *HOFFMAN*, AND MISINTERPRETS FEDERAL LAW.

A. Review additionally is warranted because of the conflict between the decision below and this Court's decision in *Hoffman*. See Pet. 20-22. As we have shown, *Hoffman* declared that IRCA established a "comprehensive scheme" for regulating the employment of undocumented aliens and "forcefully made combating the employment of illegal aliens central to the policy of immigration law." 535 U.S. at 147 (alteration and internal quotation marks omitted); see Pet. 20-22.

Respondents' sole answer is the same one the Ninth Circuit offered—that *Hoffman* concerned displacement of a federal regulation, not preemption of a state statute, and that *Hoffman* did not specifically analyze IRCA's preemption clause. Opp. 13-14. Like the Ninth Circuit, however, respondents undertake no analysis of why this distinction makes any difference. They argue that "the question that the Court resolved in *Hoffman* is quite different from the one presented here," *id.* at 14, but this naked assertion begs the important question without answering it. See also Pet. App. 16a. In fact, this distinction proves nothing—if anything, the "comprehensive" nature of

the statute can more easily coexist with federal regulation than with the chaos of statutes and ordinances by states and localities around the country. The case for preemption here is therefore stronger than even in *Hoffman*.

What is more, if there were some legitimate dispute over the application of *Hoffman*, that is more reason, not less, for this Court to grant review. See Gressman et al., *supra*, § 4.5, at 250; *e.g.*, *SEC* v. *Edwards*, 540 U.S. 389, 392-93 (2004) (granting certiorari when court of appeals misconstrued Supreme Court case as inapplicable). This is all the more true given that the question involves the continuing validity of one of this Court's precedents. See generally *Rodriguez de Quijas* v. *Shearson/Am. Express, Inc.*, 490 U.S. 477, 484 (1989).

B. As previously noted, the brief in opposition is principally devoted to arguing the merits of this case. See Opp. 12-22. These arguments are secondary at this stage, and mistaken in any event.

1. Federal law preempts state and local laws that "impos[e] civil or criminal sanctions (other than through licensing and similar laws) upon those who employ, or recruit or refer for a fee for employment, unauthorized aliens." 8 U.S.C. § 1324a(h)(2). The Arizona statute is preempted because it imposes penalties on employers who hire unauthorized aliens. See Pet. 22-23. Respondents do not deny that the Arizona statute is preempted unless it falls within the parenthetical savings clause for "licensing and similar laws," which they claim it does. Opp. 15-18. A "licensing" statute, however, defines the qualifications that are necessary to engage in a particular occupation, such as are contained in a professional certification or permit. Pet. 23-25. The punitive Arizona statute does not meet that standard, nor do respon-

dents claim that it does. Instead, they argue that *any* statute that would shutter a business—the "business death penalty" touted by then-Governor Napolitano, see *id.* at 9—constitutes a "license" just because it could take away the right to do business. This result is utterly counterintuitive; it would mean that the same Congress that imposed carefully graduated penalties for federal violations, see *id.* at 24-25, nonetheless intended to permit states to evade preemption whenever they impose the harshest possible sanction on businesses. See *id.* Respondents do not remotely justify this senseless result as consistent with Congress's intent, which is the ultimate touchstone of preemption.

This provision further is preempted because the savings clause was added to allow states to condition permits and licenses on a record of compliance with *federal law*, not to impose their own independent penalties for violations of state law. See H.R. Rep. No. 99-682, pt. I, at 58 (1986); Pet. 23-24. Respondents' contrary argument would permit every municipality in the country to engage in shadow enforcement of their preferred version of federal law, even in the absence of any prior adjudication by the specialized federal authorities in the specialized federal administrative process created by federal law for this very purpose. This result is not what Congress intended, see Pet. 25, and it is flatly inconsistent with the Court's admonition against giving "broad effect to savings clauses" like this one. *Geier* v. *Am. Honda Motor Co.*, 529 U.S. 861, 870 (2000).

2. The Arizona statute also is preempted because it requires all employers in the state to use the federal "E-Verify" system to confirm work authorization status. Pet. 25-27. Respondents do not deny that federal law defines E-Verify as voluntary for employers,

but contend that the Arizona provision is not preempted because federal law does not explicitly preclude *state* mandates to use E-Verify. See Opp. 19-22. At most, this argument would defeat one particular *express* preemption argument, but it ignores the manifest conflict between the Arizona statute and the purposes of the comprehensive federal law. See, *e.g.*, *Bonito Boats, Inc.* v. *Thunder Craft Boats, Inc.*, 489 U.S. 141, 161 (1989). Congress made E-Verify voluntary so that it could gauge employer response and determine whether the system gained acceptance and should be continued. See Pet. 25-28. If every state mandated the use of the E-Verify, this purpose would be defeated—participation would not reflect employer approval of the program, but rather state mandates. Likewise, respondents' argument ignores that Congress deliberately selected a particular *method* of accomplishing its chosen goals—the implementation of voluntary E-Verify—which the Arizona statute impermissibly thwarts. See *Int'l Paper Co.* v. *Ouellette*, 479 U.S. 481, 494 (1987) ("A state law also is pre-empted if it interferes with the methods by which the federal statute was designed to reach [Congress's] goal.").

Nor is the preemption analysis different because, as respondents claim, the federal government has "'plainly envisioned and endorsed an increase in its usage.'" Opp. 21-22 (quoting Pet. App. 21a). On the contrary, Congress has carefully and incrementally made modest expansions to E-Verify's duration and geographic reach, which directly undermines the suggestion that Congress would "'endorse[]'" radical expansions in the program of the sort at issue here.

CONCLUSION

For the foregoing reasons, and those set forth in the Petition, the Petition for a Writ of Certiorari should be granted.

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AMICUS CURIAE BRIEF

No. 09-115

In the Supreme Court of the United States

CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA, ET AL., PETITIONERS

v.

CRISS CANDELARIA, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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QUESTIONS PRESENTED

1. Whether 8 U.S.C. 1324a(h)(2)—which "preempt[s] any State or local law imposing civil or criminal sanctions (other than through licensing and similar laws) upon those who employ, or recruit or refer for a fee for employment, unauthorized aliens" – expressly preempts the provisions of the Legal Arizona Workers Act (Arizona statute), Ariz. Rev. Stat. Ann. § 23-211 *et seq.*, that sanction employers for knowingly or intentionally employing unauthorized aliens.

2. Whether a state or local government may require employers to enroll and participate in the federally created and administered E-Verify program.

3. Whether the Arizona statute is impliedly preempted because it undermines what *Hoffman Plastic Compounds, Inc.* v. *NLRB*, 535 U.S. 137, 147 (2002), describes as a "comprehensive scheme" to regulate the employment of unauthorized aliens.

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Department of Homeland Security, *Memorandum of Understanding*, Oct. 29, 2008, http://www.uscis.gov/files/nativedocuments/MOU.pdf 18

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National Conference of State Legislatures, *2009 State Laws Related to Immigrants and Immigration, January 1 - December 31, 2009*, http://www.ncsl.org/default.aspx?tabid=19232 (last visited Mar. 26, 2010) 8
73 Fed. Reg. (2008):
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In the Supreme Court of the United States

No. 09-115

CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA, ET AL., PETITIONERS

v.

CRISS CANDELARIA, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

This brief is filed in response to the Court's order inviting the Solicitor General to express the views of the United States. In the view of the United States, the petition for a writ of certiorari should be granted, limited to the first question presented.

STATEMENT

This case involves a preemption challenge to the Legal Arizona Workers Act (Arizona statute), Ariz. Rev. Stat. Ann. §§ 23-211 *et seq.*

1. a. The Immigration Reform and Control Act of 1986 (IRCA), Pub. L. No. 99-603, 100 Stat. 3359, prohibits hiring for employment "an alien knowing the alien is an unauthorized alien," as well as hiring any "individual without complying with the requirements of [8 U.S.C. 1324a(b)]." 8 U.S.C. 1324a(a)(1). Subsection (b) estab-

lishes the paper-based "I-9 system," which requires an employer to examine specified documents to verify that a person is authorized to work in the United States. 8 U.S.C. 1324a(b).

IRCA establishes a federal administrative scheme for determining whether an employer has complied with these requirements, as well as an escalating series of civil (and, ultimately, criminal) penalties depending on the nature of a violation. 8 U.S.C. 1324a(e). In contrast, "[a] person or entity that * * * has complied in good faith with the requirements of subsection (b)" has "an affirmative defense" to claims of having knowingly employed an unauthorized alien. 8 U.S.C. 1324a(a)(3). IRCA also expressly "preempt[s] any State or local law imposing civil or criminal sanctions (other than through licensing and similar laws) upon those who employ, or recruit or refer for a fee for employment, unauthorized aliens." 8 U.S.C. 1324a(h)(2).

b. In 1996, Congress directed the Attorney General (who was then responsible for immigration enforcement) to "conduct 3 pilot programs of employment eligibility confirmation." Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA), Pub. L. No. 104-208, § 401, 110 Stat. 3009-655. Two of those pilot programs no longer exist; the third (originally called the Basic Pilot Program) has evolved into what is now called E-Verify. E-Verify "is an internet-based system that allows an employer to verify an employee's work-authorization status" and functions as "an alternative to the I-9 system." Pet. App. 10a.

In IIRIRA, Congress required that each federal department participate in one of the three pilot programs. § 402(e)(1)(A)(i), 110 Stat. 3009-658. Employers that violate IRCA also may be required to participate.

§ 402(e)(1)(A)(ii), 110 Stat. 3009-658. Subject to those exceptions, however, Congress provided that "the Attorney General may not require any person or * * * entity to participate in a pilot program." § 402(a), 110 Stat. 3009-656. Instead, IIRIRA states that an employer "may elect to participate in [a] pilot program," and describes such participation as "voluntary." *Ibid.*

As originally created, the E-Verify program was to last four years and to be available in at least "5 of the 7 States with the highest estimated population of aliens who are not lawfully present in the United States." § 401(b) and (c), 110 Stat. 3009-655, 3009-656. Since 1996, Congress has on four occasions extended the program's term and scope.[1] In 2003, Congress replaced previous references to the Attorney General with references to the Secretary of Homeland Security (Secretary), and directed the Secretary to make E-Verify available in all 50 States. 2003 Act, § 3(a) and (d), 117 Stat. 1944, 1945.

Under current law, the E-Verify program is authorized through September 30, 2012, at which point it will terminate absent further action by Congress. 2010 Act, § 547, 123 Stat. 2177.

2. The Arizona statute makes it a violation of state law for an employer to "knowingly" or "intentionally" employ "an unauthorized alien," and provides for enforcement of that prohibition in state court actions brought by county attorneys. Ariz. Rev. Stat. Ann.

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[1] Basic Pilot Extension Act of 2001, Pub. L. No. 107-128, § 2, 115 Stat. 2407; Basic Pilot Program Extension and Expansion Act of 2003 (2003 Act), Pub. L. No. 108-156, 117 Stat. 1944; Consolidated Security, Disaster Assistance, and Continuing Appropriations Act, Pub. L. No. 110-329, Div. A, § 143, 122 Stat. 3580; Department of Homeland Security Appropriations Act (2010 Act), Pub. L. No. 111-83, § 547, 123 Stat. 2177.

§§ 23-212(A) and (D), 23-212.01(A) and (D) (2009). The Arizona statute also requires that all employers "verify the employment eligibility of the employee through the [federal] e-verify program." *Id.* § 23-214(A).

a. The Arizona statute defines "unauthorized alien" by reference to federal law. Ariz. Rev. Stat. Ann. § 23-211(11) (2009) (incorporating 8 U.S.C. 1324a(h)(3)). In determining whether a particular alien meets that definition, the Arizona statute first provides that a state court "shall consider only the federal government's determination pursuant to 8 [U.S.C.] 1373(c)," *id.* §§ 23-212(H), 23-212.01(H), which requires federal officials to respond to inquiries about "the citizenship or immigration status of any individual." 8 U.S.C. 1373(c). In its next sentence, however, the Arizona statute states that "[t]he federal government's determination" pursuant to Section 1373(c) creates only "a rebuttable presumption of the employee's lawful status." Ariz. Rev. Stat. Ann. §§ 23-212(H), 23-212.01(H) (2009).

The Arizona statute does not require a prior federal determination with respect to whether an employer acted knowingly or intentionally in employing an unauthorized alien. Instead, the statute provides for the state court to make its own determination, subject to two evidentiary rules that reference federal law. First, an employer's demonstration that it verified the employee's work authorization through the federal E-Verify program "creates a rebuttable presumption" that the employer did not violate the Arizona statute. Ariz. Rev. Stat. Ann. §§ 23-212(I), 23-212.01(I) (2009). Second, as under IRCA, an employer "establishes an affirmative defense" to liability under the Arizona statute if it shows "that it has complied in good faith with the require-

ments of 8 [U.S.C.] 1324a(b)." *Id.* §§ 23-212(J), 23-212.01(J).

b. The consequences of violating the Arizona statute vary depending on whether the violation was knowing or intentional and whether it was a first or second violation. For a first "knowing" violation, the state court "[m]ay" order all relevant state agencies to suspend for up to ten business days "all licenses" held by the employer that are "specific to the business location where the unauthorized alien performed work," or, if the employer has no such licenses, "all licenses that are held by the employer at the employer's primary place of business." Ariz. Rev. Stat. Ann. § 23-212(F)(1)(c) and (d) (2009). For a first intentional violation, the court "shall" order such a suspension "for a minimum of ten days." *Id.* § 23-212.01(F)(1)(c).

A violation of the Arizona statute constitutes a "second violation" if it occurs within the three- or five-year probationary period that results from the finding of a first violation. Ariz. Rev. Stat. §§ 23-212(F)(3)(b), 23-212.1(F)(3)(b) (2009). During that probationary period, an employer must file quarterly reports with respect to every new hire at the business location where the employer previously employed an unauthorized alien. *Id.* §§ 23-212(F)(1)(b), 23-212.1(F)(1)(b). If a state court finds that an employer has committed a second violation (whether knowing or intentional), the court "shall order the appropriate agencies to permanently revoke all licenses that are held by the employer specific to the business location where the unauthorized alien performed work," or, if the employer has no such licenses, "all licenses that are held by the employer at the employer's primary place of business." *Id.* §§ 23-212(F)(2), 212.01(F)(2).

The Arizona statute defines "[l]icense" as "any agency permit, certificate, approval, registration, charter or similar form of authorization that is required by law and that is issued by any agency for the purposes of operating a business in this state." Ariz. Rev. Stat. Ann. § 23-211(9)(a) (2009). The Arizona statute further provides that "[l]icense" includes articles of incorporation and certificates of partnership but excludes "[a]ny professional license." *Id.* § 23-211(9)(b)(i)-(ii) and (c).

c. The Arizona statute provides no direct mechanism for enforcing its requirement that all employers use E-Verify. As noted previously, however, the Arizona statute provides that an employer that does so gains a rebuttable presumption that it did not knowingly or intentionally employ an unauthorized alien. In addition, failure to use E-Verify renders an employer ineligible for "any grant, loan or performance-based incentive from any government entity." Ariz. Rev. Stat. Ann. § 23-214(B) and (B)(1) (2009).

3. After a bench trial on stipulated facts, the district court concluded that the Arizona statute is not preempted. Pet. App. 49a-94a.

4. The court of appeals affirmed. Pet. App. 1a-25a.

a. The court first concluded that Section 1324a(h)(2) does not expressly preempt the Arizona statute's employer-sanctions provisions because those provisions fall within the savings clause permitting States to "impos[e] civil or criminal sanctions" so long as they do so "through licensing and similar laws." 8 U.S.C. 1324a(h)(2); see Pet. App. 14a-19a. Relying on *De Canas* v. *Bica*, 424 U.S. 351 (1976), the court of appeals applied a presumption against preemption "because the power to regulate the employment of unauthorized aliens remains within the states' historic police

powers." Pet. App. 16a. The court also determined that the Arizona "statute's broad definition of 'license' is in line with the terms traditionally used" to describe a license and that IRCA's legislative history did not warrant a different result. *Id.* at 17a-18a.

b. The court of appeals rejected petitioners' contention "that the Arizona provision mandating the use of E-Verify is impliedly preempted because it conflicts with Congressional intent to keep the use voluntary." Pet. App. 19a. The court observed that "Congress could have, but did not, expressly forbid state laws from requiring E-Verify participation," and it concluded that Congress's decision to make "participation * * * voluntary at the national level" did not "in and of itself indicate that Congress intended to prevent states from making participation mandatory." *Id.* at 20a. The court also noted that Congress "strongly encouraged" use of E-Verify "by expanding its duration and its availability," which showed that "Congress plainly envisioned and endorsed an increase in its usage." *Id.* at 21a.

c. The court of appeals rejected petitioners' assertion that the Arizona statute's "potential sanctions of suspension or revocation of an employer's business license impliedly conflict with IRCA." Pet. App. 21a. Petitioners argued that such "harsh sanctions," even if expressly saved from preemption by IRCA's savings clause, would "have the effect of encouraging employers to discriminate, and that such an effect would conflict with IRCA's purposes" of balancing effective enforcement of immigration laws with protection for civil rights. *Ibid.* The court of appeals determined, however, that petitioners' argument was "essentially speculative," because no complaints had "yet been filed under the" Arizona statute and the court had before it "no record

reflecting the [Arizona statute's] effect on employers." *Id.* at 21a-22a.[2]

DISCUSSION

The issues presented by the petition for a writ of certiorari are important and recurring. Throughout the country, States and localities have enacted—and are continuing to consider and enact—statutes and ordinances regulating the employment of unauthorized workers. See National Conference of State Legislatures, *2009 State Laws Related to Immigrants and Immigration, January 1 - December 31, 2009*, http://www.ncsl.org/default.aspx?tabid=19232 (last visited Mar. 26, 2010).[3] In particular, several States have enacted statutes that, like the Arizona statute at issue here, use suspension or revocation of licenses as a mechanism to penalize employers for hiring unauthorized workers. And several States have also, like Arizona, mandated use of E-Verify by some or all employers. App., 1a-3a, *infra*. To be sure, the enacted and proposed laws vary in their particulars, and there currently is no direct conflict in the circuits.[4] But these laws raise significant legal is-

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[2] The court of appeals also rejected petitioners' assertion that the Arizona statute violates the Due Process Clause by "depriv[ing] employers of * * * an adequate opportunity to dispute whether an employee was authorized to work." Pet. App. 23a-24a. Petitioners do not renew that claim.

[3] Arizona has recently enacted new legislation that, among other things, imposes sanctions on aliens who apply for, solicit, or perform work without authorization to do so. Ariz. Rev. Stat. § 13-2928 (enacted Apr. 23, 2010). That legislation is not at issue in this case.

[4] Although the Tenth Circuit's recent decision in *Chamber of Commerce* v. *Edmondson*, 594 F.3d 742 (2010), stated that it was "unpersuaded by" the Ninth Circuit's reasoning in this case in certain respects, *id.* at 770, there is no direct conflict between the two decisions.

sues, already have generated confusion among both employers and employees, and will continue to do so absent guidance from either Congress or this Court.

These considerations warrant a grant of certiorari with respect to the first question presented, which involves the employer-sanctions provisions of the Arizona statute. Those provisions disrupt a careful balance that Congress struck nearly 25 years ago between two interests of the highest importance: ensuring that employers do not undermine enforcement of immigration laws by hiring unauthorized workers, while also ensuring that employers not discriminate against racial and ethnic minorities legally in the country. Accordingly, the first question presented involves "an important question of federal law that has not been, but should be, settled by this Court." Sup. Ct. R. 10(c).

In contrast, certiorari is unnecessary and unwarranted with respect to the E-Verify question. As of now, Congress has not chosen to require use of E-Verify by all employers, and the better reading of the law is that States and localities may not impose such requirements. But E-Verify is continuing to evolve, discussions are

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Edmondson involved a preemption challenge to an Oklahoma law that, among other things, (1) declares it a "discriminatory practice" to fire an employee who is legally authorized to work in the United States while retaining an employee that the employer knows or should know is not so authorized and (2) mandates use of E-Verify by certain employers. Oklahoma, however, specifically "waived any argument that its Act [was] a licensing or other similar law." *Ibid.* In addition, *Edmondson* did not reach any conclusion about the validity of Oklahoma's E-Verify requirement because one judge concluded that the plaintiffs lacked standing, *id.* at 772-774 (Hartz, J., concurring and dissenting), and the other two judges reached differing conclusions on the merits. Compare *id.* at 768-769 (opinion of Lucero, J.), with *id.* at 771-772 (Kelly, J., concurring in part).

ongoing within the federal government about appropriate ways to modify the system, and the sunset provision ensures that Congress will revisit the program and decide by September 30, 2012, whether to maintain it in its current form or modify the program. Thus, any decision on the E-Verify question could soon be overtaken by events, and there is no compelling need for the Court to intervene in this interim period. The Court should likewise deny certiorari with respect to the third question presented, which relies on a decision of this Court that did not involve preemption and has no bearing on the validity of the Arizona statute.

A. The Employer-Sanctions Question Warrants This Court's Review

IRCA expressly preempts "any State or local law imposing civil or criminal sanctions (other than through licensing and similar laws) upon those who employ, or recruit or refer for a fee for employment, unauthorized aliens." 8 U.S.C. 1324a(h)(2). Respondents concede (Br. in Opp. 12) that the Arizona statute "impos[es] * * * sanctions." The Ninth Circuit determined, however, that the Arizona statute is saved from preemption because it falls within the savings clause. Pet. App. 14a-19a. That conclusion is incorrect.

1. The Arizona statute is not at bottom a "licensing [or] similar law[]"; it is instead a statute that prohibits the hiring of unauthorized aliens and uses suspension and revocation of all state-issued licenses as its ultimate sanction. Cf. S.C. Code Ann. §§ 41-8-20(A), 41-8-50(D)(2)-(4) (2009) (providing that "[a]ll private employers * * * shall be imputed a South Carolina employment license," which may be suspended or revoked if the employer knowingly or intentionally employs an unau-

thorized alien). The Arizona statute establishes neither a process nor any general standards for assessing an applicant's character or fitness to engage in a particular type of activity. Cf. *Cleveland* v. *United States*, 531 U.S. 12, 21 (2000) (describing previous cases involving "licensing schemes" governing the transport and sale of alcohol, the sale of stock, and the operation of ferries). It identifies only one basis for suspending or revoking an employer's licenses—*i.e.*, the knowing or intentional employment of an unauthorized alien. And the decision whether to suspend or revoke is made on an across-the-board basis by a state judge rather than on a license-by-license basis by the authorities who issued them.

2. The Ninth Circuit's decision also violates the maxim that exceptions should not be permitted to "swallow the rule." *Cuomo* v. *Clearing House Ass'n, L.L.C.*, 129 S. Ct. 2710, 2718 (2009); see *Knight* v. *Commissioner*, 552 U.S. 181, 191 (2008) (when "Congress has enacted a general rule," courts "should not eviscerate that legislative judgment through an expansive reading of a somewhat ambiguous exception") (citation omitted).

The general rule is that States may not "impos[e] civil or criminal sanctions * * * upon those who employ * * * unauthorized aliens." 8 U.S.C. 1324a(h)(2). This provision would prevent a State from imposing the smallest of fines on an employer as punishment for knowingly or intentionally hiring an unauthorized alien. Yet the Ninth Circuit's decision holds that a State may take the far greater step of terminating an employer's entire business so long as the State labels the sanction an act of licensing.[5] The meaning of "through licensing

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[5] To be sure, the Arizona statute applies only to an employer "that has a license issued by an agency in this state." Ariz. Rev. Stat. Ann.

and similar laws" in Section 1324a(h)(2) is a matter of federal, not state, law. See *Drye* v. *United States*, 528 U.S. 49, 58 (1999) (stating that "[t]he question whether a state-law right constitutes 'property' or 'rights to property'" for purposes of federal tax lien legislation "is a matter of federal law") (internal quotation marks and citation omitted). And there is no reason to believe that Congress intended a result that would subvert the purpose and operation of its general prohibition on state sanctions.

3. Courts should "decline to give broad effect to saving clauses where doing so would upset the careful regulatory scheme established by federal law." *United States* v. *Locke*, 529 U.S. 89, 106 (2000). The Ninth Circuit's broad reading of Section 1324a(h)(2)'s savings clause violates that principle.

The federal enforcement scheme created by IRCA reflects a delicate balance. When considering IRCA in 1986, Congress was well aware "of the widespread fear that" the employer-sanctions provisions "could result in

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§ 23-211(4) (2009). But the Arizona statute defines "license" very broadly, and the definition expressly includes articles of incorporation and documents necessary to create various forms of partnerships. *Id.* § 23-211(9)(b)(i)-(iv). Indeed, the definition of "license" is so broad that it would appear to include registration with the state agencies responsible for administering the state unemployment tax program—an act that is required of sole proprietorships as well. See Arizona Dep't of Econ. Sec., *Who Pays Unemployment Taxes?*, https://www.azdes.gov/main.aspx?menu=316&id=3962 (last visited Apr. 26, 2010); Arizona Dep't of Econ. Sec., *Arizona Joint Tax Application*, https://www.azdes.gov/main.aspx?menu=316&id=3960 (last visited Apr. 26, 2010); see also Ariz. Rev. Stat. Ann. § 23-211(9)(a) (2009) (defining "license" to include "any * * * registration * * * that is required by law and that is issued by any agency for the purpose of operating a business in this state").

employment discrimination against Hispanics and other minority groups." H.R. Rep. No. 682, 99th Cong., 2d Sess. Pt. 1, 49 (1986) (*1986 House Report*). In response, Congress took a number of steps that address "the potential for [an] unfortunate cause and effect relationship between sanctions enforcement and resulting employment discrimination." *1986 House Report* Pt. 2, at 12.

First, Congress provided various procedural protections and limits on liability for employers accused of violating Section 1324a by employing unauthorized aliens. Hearings are held before administrative law judges, 8 U.S.C. 1324a(e)(3)(B), and an employer may obtain federal judicial review of any adverse decision that involves a financial assessment, 8 U.S.C. 1324a(e)(8). Subject to exceptions for repeat offenders, an employer "is considered to have complied with [each applicable requirement contained in Section 1324a(b)] notwithstanding a technical or procedural failure to meet such requirement," so long as the employer made "a good faith attempt to comply." 8 U.S.C. 1324a(b)(6)(A). And outside pattern-or-practice cases, see 8 U.S.C. 1324a(f)(1), sanctions under federal law are limited to no more than $2000 per unauthorized worker in the case of a first violation and no more than $5000 per unauthorized worker in the case of a second violation. 8 U.S.C. 1324a(e)(4).

Second, Congress concluded that "sanctions enforcement and liability" for employers who hire unauthorized aliens "must be" balanced by "an equally strong and readily available remedy if resulting employment discrimination occurs." *1986 House Report* Pt. 2, at 12. Congress thus enacted a new provision, Section 1324b, which makes it "an unfair immigration-related employment practice" to discriminate based on citizenship or immigration status or based on national origin, 8 U.S.C.

1324b(a)(1), and establishes an administrative regime essentially parallel to the one under Section 1324a to enforce that prohibition. In particular, the schedule of monetary fines authorized under Section 1324b is the same as that under Section 1324a. Compare 8 U.S.C. 1324a(e)(4)(A)(i)-(iii), with 8 U.S.C. 1324b(g)(2)(B)(iv)(I)-(III).[6]

The Arizona statute disrupts the careful balance struck by Congress in IRCA. Proceedings occur before local judges, with no possibility of federal district court review, and those state adjudicators need not await or defer to a federal determination about whether an employer has knowingly or intentionally employed an unauthorized alien. The remedies authorized under the Arizona statute for hiring an unauthorized alien—suspension of an employer's licenses for a first violation and permanent revocation for a second, see p. 5, *supra*—are far more severe than those authorized under federal law. And unlike IRCA, the Arizona statute contains no parallel anti-discrimination provision

4. The court of appeals erred in relying (Pet. App. 15a) on this Court's pre-IRCA decision in *De Canas* v. *Bica*, 424 U.S. 351 (1976). In *De Canas*, the Court rejected a preemption challenge to a California law barring employers from knowingly employing an unautho-

[6] There are certain differences between the two sections. For example, criminal penalties are available for certain pattern-or-practice violations of Section 1324a (8 U.S.C. 1324a(f)(1)), but are unavailable under Section 1324b; and the imposition of monetary sanctions is mandatory under Section 1324a (8 U.S.C. 1324a(e)(4)(A)), but discretionary under Section 1324b (8 U.S.C. 1324b(g)(2)(B)(iv)). In contrast, only Section 1324b authorizes remedies designed to address the particular harms suffered by victims of discrimination, including backpay and removal of adverse performance reviews or warnings from an employee's personnel file. 8 U.S.C. 1324b(g)(2)(B)(iii) and (vii).

rized alien when doing so would have an adverse effect on lawful resident workers. *Id.* at 352. In reaching that conclusion, *De Canas* stated that "States possess broad authority under their police powers to regulate the employment relationship to protect workers within the State," and described the challenged law as "within the mainstream of" a State's police powers. *Id.* at 356.

But *De Canas* did not involve the express preemption provision that is at issue in this case. To the contrary, when *De Canas* was decided, federal law did not generally regulate the employment of unauthorized aliens, and the Court saw "Congress' failure to enact" such a law as evidence that "Congress believes this problem * * * is appropriately addressed by the States as a local matter." 424 U.S. at 360 n.9.

IRCA is what was missing when the Court decided *De Canas*—a "general law[]" that makes it unlawful for employers to hire unauthorized aliens. 424 U.S. at 360 n.9. And unlike the more limited federal laws in place at the time of *De Canas*, IRCA contains a "specific indication" (Section 1324a(h)(2)) "that Congress intended to preclude even harmonious state regulation." *Id.* at 358. Because it can no longer be said that federal law has only "a peripheral concern with employment of illegal entrants," *id.* at 360, *De Canas* provides no support for applying a presumption against preemption in this case.

B. The E-Verify Question Does Not Warrant This Court's Review

1. There is substantial reason to doubt whether the Ninth Circuit was correct in holding that, under current law, States may mandate participation in the federal E-Verify program. As noted previously, the program that has evolved into E-Verify began as one of three pilot

programs created in 1996 to study ways to improve the process of verifying employment eligibility. As originally conceived, those programs were meant to be limited in scope and temporary in duration. See p. 3, *supra*.

Consistent with the aim of studying the use of cooperative agreements with employers to verify employment eligibility, the statutory text indicates that Congress intended participation in E-Verify to be achieved through individual election rather than a blanket mandate on all employers. Subject to two express exceptions—federal departments and employers previously found to have violated IRCA, see pp. 2-3, *supra*—Congress provided that an employer that conducts hiring in a State in which a pilot program is operating "may elect to participate in that pilot program." IIRIRA § 402(a), 110 Stat. 3009-656. Other provisions of the same statute and the accompanying section headings refer to an employer's "elect[ion]" to participate in a pilot program,[7] as well as "the voluntary nature of" the programs.[8] These provisions suggest that Congress intended, as a general matter, to permit employers to choose whether to participate in E-Verify.

The structure of the statute and the language of voluntariness would appear to bar Arizona's mandate. To be sure, the statutory text does not "expressly forbid state laws from requiring E-Verify participation," Pet. App. 20a, and the Secretary of Homeland Security is the only government official whom Congress has specifically barred from "requir[ing] any person or other entity to

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[7] §§ 402(b)(2), (c)(1), (2)(A) and (i)-(ii), (2)(B) and (B)(i), (3)(A) and (B), (4), 403(a)(1) 110 Stat. 3009-657 to 3009-659.

[8] § 402(d)(2) and (3)(A), 110 Stat. 3009-658.

participate in a pilot program." IIRIRA § 402(a), 110 Stat. 3009-656. But the statutory language contains no indication that Congress intended to permit States to undermine its own decision not to impose a blanket mandate on all employers by allowing States to impose just such a mandate.

Congress's determination that E-Verify be administered by federal employees using federal resources further suggests that state and local governments may not require employers to participate. In the particular circumstances of this case, a state mandate will not deplete limited federal resources: the Department of Homeland Security (DHS) advises that the E-Verify system can accommodate the increased use that the Arizona statute and other existing similar laws would create. But in a wide variety of other contexts, participation requirements imposed by state or local governments may overload otherwise elective federal programs by increasing the number of participants beyond what Congress anticipated. Federal statutes of this kind should not ordinarily be understood to give States the ability to impose such burdens on federal programs.

The nature of what an employer must agree to in order to participate in E-Verify casts further doubt on the Ninth Circuit's conclusion that States and localities may mandate participation in the absence of federal authorization to do so. To comply with the Arizona statute's requirement to use E-Verify, an employer would need to enter into a Memorandum of Understanding (MOU) with both DHS and the Social Security Adminis-

tration (SSA)[9] and follow additional federal statutory requirements that are applicable only to users of E-Verify, see IIRIRA § 403(a), 110 Stat. 3009-659.

This Court has stated that "the relationship between a federal agency and the entity it regulates is inherently federal in character because the relationship originates from, is governed by, and terminates according to federal law." *Buckman* v. *Plaintiffs' Legal Comm.*, 531 U.S. 341, 347 (2001). A State's action to require an employer to enter into a contractual arrangement with the federal government when the formation of such an arrangement otherwise would have been the voluntary choice of the employer threatens to change the character of that relationship and thus upset the "delicate balance of statutory objectives" sought by Congress. *Id.* at 348. Absent congressional authorization nowhere present in this statute, a State may not restructure in this fundamental way the regulatory relationships and functions of a federal agency.[10]

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[9] The MOU is available at http://www.uscis.gov/files/nativedocuments/MOU.pdf.

[10] On June 6, 2008, President George W. Bush issued an Executive Order requiring all executive departments and agencies that enter into contracts to "require, as a condition of each contract, that the contractor agree to use an electronic employment eligibility verification system designated by the Secretary [of Homeland Security] to verify the employment eligibility of" certain employees. Exec. Order No. 13,465, 73 Fed. Reg. 33,286. After then Secretary Michael Chertoff designated "the E-Verify system, modified as necessary and appropriate," as the relevant system, *id.* at 33,837 (2008), the Administrator of the General Services Administration and the Administrator of the National Aeronautics and Space Administration promulgated a final rule requiring certain federal contractors and subcontractors to use E-Verify for certain employees. *Id.* at 67,651. Both the Executive Order and the rule were challenged, and the district court granted summary judgment

to the government defendants. *Chamber of Commerce* v. *Napolitano*, 648 F. Supp. 2d 726 (D. Md. 2009). The plaintiffs voluntarily dismissed their appeal on December 14, 2009. No. 09-2006 Docket entry Nos. 21 22 (4th Cir.).

The government's position in the federal contractor litigation is consistent with its position here. The Executive Order and the corresponding regulations were issued pursuant to the President's broad authority to "prescribe policies and directives that the President considers necessary to carry out" the provisions of the Federal Property and Administrative Services Act of 1949 (Procurement Act), Ch. 288, 40 U.S.C. 121, so long as those directives are "consistent" with the Procurement Act itself, 40 U.S.C. 121(a); and, unlike the Arizona law at issue here, the Executive Order raises no issues concerning the relationship between the federal and state governments. Moreover, as the government noted in the federal contractor litigation, the choice to become a federal contractor is entirely voluntary and never compelled. And in light of Congress's mandate that all federal departments participate in a pilot program to verify employment eligibility, IIRIRA § 402(e)(1)(A)(i), 110 Stat. 3009-658, there is an obvious symmetry in requiring that those who wish to enter into a cooperative relationship with one of those departments do so as well.

One of the plaintiffs' arguments in the federal contractor litigation was that the final rule violated the provision of IIRIRA stating that the Secretary "may not require any person or other entity to participate in a pilot program." § 402(a), 110 Stat. 3009-656. As part of its response, the government argued that Section 402(a) was inapplicable because the Secretary did not issue the final rule. In connection with that argument, one of the government's briefs stated: "[A]s plaintiffs' *amici* point out, the State of Arizona has required all public and private employers in that State to use E-Verify to verify the employment status of their workers. This is permissible because the State of Arizona is not the Secretary of Homeland Security." Defs' Reply Mem. in Supp. of their Mot. for Summ. J. at 7, *Chamber of Commerce*, *supra* (citations omitted); see Opp'n to Pls.' Emergency Mot. for an Injun. Pending Appeal at 7, *Chamber of Commerce* v. *Napolitano*, No. 09-2006 (4th Cir. filed Sept. 6, 2009) (similar). This statement, however, did not reflect a blanket pronouncement on the validity of the Arizona statute from all constitutional and statutory challenges. Obviously, no such challenges (nor the Arizona statute itself) were at issue in the federal-contractor

2. Nonetheless, this Court's review is not now warranted on the E-Verify question. As an initial matter, the Arizona statute contains no direct mechanism for enforcing its requirement that all employers use E-Verify. In the absence of such a mechanism, it is as yet unclear how Arizona's requirement of E-Verify participation will be implemented, at least with respect to employers who do not receive "grant[s], loan[s] or performance-based incentive[s] from" state or local entities. Ariz. Rev. Stat. Ann. § 23-214(B) and (B)(1) (2009).

Still more important, the requirement of E-Verify participation is itself a moving target. The first question presented, concerning employer sanctions, involves whether the Arizona statute and others like it, App., *infra*, 1a-2a, are consistent with the express terms of a comprehensive federal statutory regime (IRCA) that has been in place for nearly 25 years. In contrast, the second question presented, concerning E-Verify, involves the relationship between the Arizona statute and a still-evolving federal program whose nature and scope have changed in numerous respects since its creation and which may change again in the near future. See p. 3, *supra*.

In what form E-Verify should exist; whether Congress should mandate participation by some or all employers; and whether States and localities should be able to require participation and, if so, in what circumstances all raise "important federal question[s]." Sup. Ct. R. 10(c). In contrast to the questions raised by the employer-sanctions provisions, these difficult and evolving issues regarding E-Verify should be resolved, at

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litigation. Instead, the statement in that brief was limited to explaining the scope of the express prohibition contained in Section 402(a), which is by its terms limited to the Secretary.

least in the first instance, by the political branches, rather than this Court. The Arizona statute is not currently creating a strain on federal resources, see p. 17, *supra*, so there is no pressing need for this Court's intervention. Electronic verification of work authorization is expected to receive close attention in any immigration reform legislation, and the sunset provision will in any case require Congress to consider before September 30, 2012, whether to maintain E-Verify as it currently exists or instead modify the program. See p. 3, *supra*. In these circumstances, the Court should deny certiorari as to the second question presented.

C. The Third Question Presented Does Not Warrant This Court's Review

Petitioners also argue that the Arizona statute is impliedly preempted because it undermines what this Court's decision in *Hoffman Plastic Compounds, Inc.* v. *NLRB*, 535 U.S. 137, 147 (2002) (*Hoffman*), describes as IRCA's "comprehensive scheme prohibiting the employment of illegal aliens in the United States." That claim does not warrant further review.

Hoffman is irrelevant to the issues here. That case "did not involve preemption, or indeed any state regulation." Pet. App. 16a. Instead, *Hoffman* involved whether a federal entity (the National Labor Relations Board (Board)) could award a particular remedy (backpay) to an unauthorized alien for violations of a federal statute (the National Labor Relations Act (NLRA), 29 U.S.C. 151 *et seq.*). See *Hoffman*, 535 U.S. at 140. No federal statute addressed the relationship between the NLRA and IRCA. Instead, the Court relied on a principle, derived from previous decisions, that "the Board's chosen remedy * * * may be required to yield" if it "trenches

upon a federal statute or policy outside the Board's competence to administer." *Id.* at 147.

Here, in contrast, Congress has (in Section 1324a(h)(2)) directly addressed the relationship between IRCA and state laws regulating employment of unauthorized aliens. Because that section expressly preempts the Arizona statute at issue, see pp. 10-15, *supra*, the Court need not consider any questions of implied preemption. And even if the Court were to do so, the implied preemption inquiry would involve "[f]ederalism concerns [that] were not at issue and, therefore, were not addressed in *Hoffman*." *Madeira* v. *Affordable Hous. Found., Inc.*, 469 F.3d 219, 237 (2d Cir. 2006). The Court therefore should deny certiorari with respect to the third question presented.

CONCLUSION

The petition for a writ of certiorari should be granted, limited to the first question presented.

Respectfully submitted.

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APPENDIX

Statutes and ordinances providing for suspension of licenses based on hiring of undocumented aliens

Miss. Code Ann. § 71-11-3(4)(a) (2009) (stating that employers may "only hire employees who are legal citizens of the United States of American or are legal aliens"); *id.* § 71-11-3(7)(e) (2009) (providing for "the loss of any license, permit, certificate or other document granted to the employer by any agency, department or government entity in the State of Mississippi for the right to do business in Mississippi for up to one (1) year, or both" for a violation of Section 71-11-3(4)(a)).

Mo. Rev. Stat. § 285.530(1) (2010) ("No business entity or employer shall knowingly employ * * * an unauthorized alien"); *id.* § 285.535(8) (2010) (providing for a one-year suspension of "the business permit * * * and any applicable license or exemptions of [any] business entity" that commits a second violation of Section 285.530(1)).

S.C. Code Ann. § 41-8-30 (2009) ("A private employer shall not knowingly or intentionally employ an authorized alien); *id.* § 41-8-50(D)(2)-(4) (providing for a suspension of an employer's "license" for between ten and 30 days for a first violation, a suspension of between 30 and 60 days for a second violation, and revocation of license for a third violation); *id.* § 41-8-20(A) (stating that "[a]ll private employers in South Carolina on or after July 1, 2009, shall be imputed a South Carolina employment license" and "may not employ a person unless his South Carolina employment license is in effect and is not suspended or revoked").

Tenn. Code Ann. § 50-1-103(b) (2008) (barring any person from "knowingly employ[ing] * * * an illegal alien"); *id.* § 50-1-103(e)(1)(B) (providing for a one-year suspension of an employer's "license" upon a second violation); *id.* § 50-1-103(a)(8) (defining "[l]icense" as "any certificate, approval, registration or similar form of permission required by law").

Va. Code Ann. § 13.1-753(A)(iv) (2009) ("The corporate existence of a corporation may be terminated involuntarily by order of the [appropriate state agency] when it finds that the corporation * * * (iv) has been convicted for a violation of 8 U.S.C. § 1324a(f), as amended, for actions of its officers and directors constituting a pattern or practice of employing unauthorized aliens in the Commonwealth.").

W. Va. Code Ann. § 21-1B-3(a) (2008) ("It is unlawful for any employer to knowingly employ, hire, recruit or refer, either for him or herself or on behalf of another, for private or public employment within the state, an unauthorized worker who is not duly authorized to be employed by law."); *id.* § 21-1B-7(a)(1) and (2) (providing for suspension or revocation of "any license held by the employer" upon a third violation of Section 21-1B-3(a)); *id.* § 21-1B-2(f) (defining "[l]icense" as "any permit, certificate, approval, registration, charter or similar form of authorization that is required by law and that is issued for the purpose of operating a business in this state").

States requiring participation in E-Verify

Miss. Code Ann. § 71-11-3(b)(i) (West 2009) (requiring all employers to use E-Verify).

S.C. Code Ann. § 41-8-20(B) (2009) (requiring that, as of July 1, 2009, all employers must either participate in E-Verify or employ only workers who (1) have a valid South Carolina license, (2) are eligible for a South Carolina license, (3) or possess a driver's license or identification card from a state with requirements at least as strict as South Carolina's).

Colo. Rev. Stat. § 8-17.5-102 (2009); Ga. Code Ann. § 13-10-91 (2009); Minn. Exec. Order No. 08-01; Mo. Rev. Stat. § 285.530 (2010); Neb. Rev. St. § 4-114 (2009); R.I. Exec. Order No. 08-01 (all requiring employers with state government contracts to use E-Verify);

Utah Code Ann. § 63G-11-103(c)(ii) (2008) (requiring contractors to use an electronic verification program to verify new hires but permitting contractors to choose from more than one verification program, including E-Verify and the Social Security Number Verification Service ("SSNVS")).

Okla. Stat. Tit. 25, § 1313(A) and (B) (West 2010) (requiring that all public employers, those who contract with public employers, and those who contract with those who contract with public employers to use a state-designated Status Verification System); *id.* § 1312 (defining "Status Verification System" to include E-Verify, any other program operated by DHS, an "independent, third-party system with an equal or higher degree of reliability," or the "Social Security Number Verification Service" operated by SSA).

AMICUS CURIAE BRIEF

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Supreme Court of the United States

CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA, *et al.*,

Petitioners,

v.

CRISS CANDELARIA, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF OF *AMICI CURIAE* ASIAN AMERICAN JUSTICE CENTER, *ET AL.*, IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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Pub. L. No. 104-208, 110 Stat. 3009-546 8

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8 U.S.C. § 1324b	10
8 U.S.C. § 1324b(g)(2)(B)(iv)	10
8 U.S.C. § 1324b(g)(2)(B)(iv)(I)	10

Other:

Dena Bunis, *Employment verification days are numbered*, Orange County Register, May 6, 2008, *available at* http://www.ocregister.com/ocregister/news/local/immigration/article_2035598.php	26
131 Cong. Rec. S11414-03 (daily ed. Sept. 13, 1985)	17

Cited Authorities

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132 Cong. Rec. H9708-02 (daily ed. Oct. 9, 1986) 17

149 Cong. Rec. H9896 (daily ed. Oct. 28, 2003) ... 19

154 Cong. Rec. H7589 (daily ed. July 30, 2008) ... 24

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Federal Acquisition Regulation, FAR Case 2007-013, Employment Eligibility Verification, 74 Fed. Reg. 26,981 (June 5, 2009) 14

Daniel González, *Taunts, Threats as Law Nears*, The Arizona Republic, Sept. 30, 2007 12

H.R. Rep. No. 99-682(I), *as reprinted in* 1986 U.S.C.C.A.N. 5649, 5672 16

How Errors in Basic Pilot/E-Verify Databases Impact U.S. Citizens and Lawfully Present Immigrants, National Immigration Law Center, April 2008, *available at* http://www.nilc.org/immsemplymnt/ircaempverif/e-verify_impacts_ USCs_2008-04-09.pdf 26

Caroline Isaacs, Sanctioning Arizona: The Hidden Impacts of Arizona's Employer Sanctions Law, American Friends Service Committee, January 2009, available at http://www.afsc.org/tucson/ht/a/GetDocumentAction/i/74700 26

Cited Authorities

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Alexandra Marks, *With E-Verify, Too Many Errors to Expand Its Use?*, The Christian Science Monitor, July 7, 2008, *available at* http://www.csmonitor.com/2008/0707/p02s01-usgn.html 26

Office of the Inspector General, Social Security Administration, *Accuracy of the Social Security Administration's Numident File*, A-08-06-26100, December 2006, *available at* http://www.ssa.gov/oig/ADOBEPDF/A-08-06-26100.pdf 20

Findings of the Web Basic Pilot Evaluation (2007), U.S. Citizenship and Immigration Services at: http://www.uscis.gov/files/article/WebBasicPilotRprtSept2007.pdf 24

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INTEREST OF *AMICI CURIAE* [1]

The *amici curiae* listed below are non-profit organizations that share a common interest in advancing and protecting the civil rights of all persons, including those of immigrants:

- Asian American Justice Center
- Asian American Institute
- Asian Pacific American Legal Center of Southern California
- La Raza Centro Legal
- LatinoJustice PRLDEF
- Lawyers' Committee for Civil Rights Under Law
- League of United Latin American Citizens
- Los Abogados Hispanic Bar Association
- National Council of La Raza
- National Day Laborer Organizing Network
- Southern Poverty Law Center

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1. No counsel for a party authored this brief in whole or in part, and no such counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amici curiae*, their members, or their counsel made a monetary contribution to its preparation or submission. The parties have consented to the filing of this brief. Counsel of record for all parties received notice at least ten days prior to the due date of the *amici curiae's* intention to file this brief. The letters of consent have been filed with, or will be sent to, the Clerk.

Each organization is committed to preventing discrimination against employees, including those who may look or sound foreign. Each organization has a strong interest in opposing state laws that regulate employment of unauthorized workers, including the Legal Arizona Workers Act (the "Arizona statute"),[2] because those laws interfere with federal laws specifically designed to prevent discrimination. *Amici* support the Petition for a Writ of Certiorari and submit that review should be granted. This brief highlights Congress' long-standing and well-documented desire to prevent discrimination that will result from mandatory use of the E-Verify system. The specific interest of each *amicus* is described in more detail below.

The **Asian American Justice Center** ("AAJC") is a national non-profit, non-partisan organization whose mission is to advance the human and civil rights of Asian Americans through advocacy, public policy, public education, and litigation. Collectively, AAJC and its affiliates—the Asian American Institute, the Asian Law Caucus, and the Asian Pacific American Legal Center of Southern California—have over fifty years of experience in litigation, public policy, advocacy, and community education on discrimination issues. AAJC has advanced its long-standing concern for protecting the rights of immigrants—a significant proportion of whom are Asian Americans—by filing briefs in immigration cases and educating policymakers and the public on the need for fair and humane immigration laws.

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2. Other states that require or will require all employers to use E-Verify are Mississippi and South Carolina. *See* Miss. Code Ann. § 71-11-3; S.C. Code Ann. 41-8-20.

The **Asian American Institute** ("AAI") is a pan-Asian, non-partisan, not-for-profit organization located in Chicago, Illinois, whose mission is to empower and advocate for the Asian American community through advocacy, coalition-building, education, and research. AAI's programs include community organizing, leadership development, and legal advocacy. AAI is deeply concerned about the discrimination that Asian Americans face in hiring and employment practices, including discrimination against those who look or sound foreign. Laws such as the Arizona statute worsen discrimination against Asian American members of the workforce and frustrate Congress' intent to balance immigration control concerns with discrimination concerns. Accordingly, AAI has a strong interest in the outcome of this case.

The **Asian Pacific American Legal Center of Southern California** ("APALC") was founded in 1983 and is the nation's largest non-profit public interest law firm devoted to the Asian Pacific American community. Serving 15,000 individuals and organizations each year, APALC has expertise in workers' rights, anti-discrimination, immigrant welfare, immigration and citizenship, voting rights, and hate crimes. APALC represents and advocates for immigrants through public advocacy, community education, and litigation to ensure their protection against discrimination, and it has assisted individuals wrongly identified under the E-Verify system. APALC has a long-standing interest in this case because the mandatory implementation of a flawed employment verification program significantly impacts Asian Pacific Americans.

La Raza Centro Legal is a community-based legal organization dedicated to empowering Latino, immigrant and low-income communities of San Francisco to advocate for their civil and human rights. It combines legal services, organizing, advocacy, and social services to build grassroots power and alliances towards creating a movement for a just society. Through all of its work, La Raza Centro Legal provides the highest quality legal representation, services, and advocacy for low income communities, workers who experience workplace abuses, and immigrants. Through its Legal Services and Day Labor Programs, La Raza Centro Legal advocates for the rights of low wage immigrant workers. It has a strong interest in protecting immigrant workers from workplace abuses.

LatinoJustice PRLDEF (formerly known as the Puerto Rican Legal Defense and Education Fund) is a non-profit, non-partisan civil rights organization founded in New York City in 1972. Its continuing mission is to advocate for and defend the constitutional rights of all Latinos under the law. It seeks to accomplish this by promoting the civic participation of the pan-Latino community, cultivating Latino community leaders, and bringing impact litigation addressing the basic civil and human rights of Latinos in employment, education, language, fair housing, immigrants' and migrants' rights. During its 37-year history, LatinoJustice has litigated numerous cases on behalf of the Latino community against multiple forms of discrimination. LatinoJustice PRLDEF has argued landmark civil rights cases that have had profound implications for all Latinos.

The **Lawyers' Committee for Civil Rights Under Law** ("Lawyers' Committee") is a tax-exempt, non-profit civil rights organization that was founded in 1963 by the leaders of the American bar, at the request of President John F. Kennedy, in order to help defend the civil rights of minorities and the poor. Its Board of Trustees presently includes several past presidents of the American Bar Association, past Attorneys General of the United States, law school deans and professors, and many of the nation's leading lawyers. The Lawyers' Committee has been involved in challenging state statutes and municipal ordinances that require private citizens to act as immigration officials and provide incentives for employers to discriminate against authorized workers of color in violation of federal civil rights laws.

The **League of United Latin American Citizens** ("LULAC") has a mission to advance the economic condition, educational attainment, political influence, housing, health and civil rights of the Hispanic population of the United States. LULAC achieves its mission through advocacy, education and litigation, including filing briefs in immigration and civil rights cases that have a substantial impact on the Hispanic population and other ethnic groups.

Los Abogados Hispanic Bar Association ("Los Abogados") is an Arizona-based non-profit and non-partisan organization that focuses on promoting the business of the Hispanic legal profession within the state of Arizona. Members of Los Abogados include private

and public attorneys, judges, businesspersons, paralegals, and law students. Los Abogados has actively opposed actions directed at immigrants that can be used to marginalize Hispanics in general. This has been done by participating in community-based outreach activities, assisting in the prosecution of civil rights lawsuits and investigations of civil right abuses, and educating Arizona's courts, media, and higher-learning institutions on issues that negatively affect immigrants and Hispanics.

The **National Council of La Raza** ("NCLR") is a private, non-profit, non-partisan organization established in 1968 to reduce poverty and discrimination and improve life opportunities for Hispanic Americans. NCLR works toward this goal through two primary, complementary approaches: capacity-building assistance to support and strengthen Hispanic community-based organizations and applied research, policy analysis and advocacy. NCLR believes that state laws that regulate employment of immigrants and mandate the use of a flawed employment verification program result in large-scale discrimination against workers perceived to be foreign, and are preempted by federal immigration laws.

The **National Day Laborer Organizing Network** ("NDLON") is a nationwide coalition of day laborers and non-profit agencies that work with and for day laborers. Its mission is to improve the lives of day laborers in the United States. The aims of the coalition include working for the repeal or invalidation of laws that restrict day laborers' rights to seek and receive employment with full workplace protections. NDLON considers it among its

highest strategic priorities to vindicate and defend day laborers' civil and workplace rights. NDLON has expended resources to respond to the Arizona statute. Additionally, NDLON feels many of its constituents have been adversely impacted by the Arizona statute. Among NDLON's member organizations is the Macehualli day labor center in Phoenix, Arizona.

Founded in 1971, the **Southern Poverty Law Center** ("SPLC") has litigated numerous civil rights cases on behalf of women, people of color, prisoners, immigrants and other victims of discrimination. Although the SPLC's work is concentrated in the South, its attorneys appear in courts throughout the country to ensure that all people receive equal and just treatment under federal and state law.

SUMMARY OF ARGUMENT

Undersigned *amici* strongly urge this Court to review the decision below, which presents an issue of national importance. Statutes like Arizona's, whatever their stated purpose, have the effect of fostering discrimination. Specifically, and critical to the preemption analysis that should resolve this case, Congress has well understood that employer verification and sanction programs can result in discrimination against authorized workers, especially those who sound or appear foreign. To avoid sanctions for employing unauthorized workers as well as to avoid the costs associated with resolving verification problems under

E-Verify,[3] employers may decline to consider or employ workers who they believe look or sound foreign, because they presume such workers are unauthorized or, at a minimum, will have problems proving they are authorized under E-Verify.

Congress recognized this threat of discrimination when it considered legislation imposing sanctions for employing unauthorized workers, and it sought to craft legislation that prevented unintended discrimination. As discussed below, Congress has shaped federal immigration law to balance the federal government's interest in controlling illegal immigration with its interest in preventing discrimination against U.S. citizens and other authorized workers. Indeed, when it first imposed sanctions for employing unauthorized workers under the Immigration Reform and Control Act of 1986 ("IRCA"), Pub. L. No. 99-603, 100 Stat. 3359 (codified as amended at 8 U.S.C. §§ 1324a-1324b), Congress attempted to strike this balance by incorporating anti-discrimination provisions into IRCA. Moreover, when Congress created the E-Verify program in 1996 through passage of IIRIRA, Congress continued its balancing effort by choosing to keep employer enrollment in E-Verify voluntary and temporary, subject to renewal.

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3. Congress created a pilot electronic verification program (the federal Basic Pilot Program (now titled "E-Verify")) with the passage of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 ("IIRIRA"), Pub. L. No. 104-208, 110 Stat. 3009-546 (codified as amended at 8 U.S.C. § 1324a).

Review by this Court is required to preserve Congress' balancing of strong concerns regarding discrimination with effective immigration control through its decision to make E-Verify voluntary and temporary. Permitting states, such as Arizona, to disrupt that balance by making E-Verify mandatory and permanent would give rise to the very discrimination that Congress has expressly sought to prevent.

ARGUMENT

I. THE ARIZONA STATUTE AND OTHER SIMILAR STATE LAWS CONFLICT WITH FEDERAL LAW AND ARE PREEMPTED.

Amici support Petitioners' position that review should be granted because of the significance of the issues presented. By requiring participation in E-Verify and imposing sanctions for employing unauthorized workers, the Arizona statute and similar state laws allow discrimination against U.S. citizens and other authorized workers contrary to congressional intent. These state laws are preempted by federal immigration law.

As set forth in the Petition for a Writ of Certiorari, IRCA created a "comprehensive scheme prohibiting the employment of illegal aliens in the United States." *Hoffman Plastic Compounds, Inc. v. NLRB*, 535 U.S. 137, 147 (2002). IRCA was the product of years of deliberation and of difficult compromises that carefully balanced myriad, competing policy and political concerns. *See* Pet. 5-6, 12-13. Thus, while Congress prohibited employers from hiring undocumented

immigrants, it included a strict *scienter* requirement (8 U.S.C. § 1324a(a)(1)(A)); imposed relatively mild penalties for initial infractions (*id.* § 1324a(e)(4)); and balanced its ban on knowingly hiring unauthorized workers with its ban on discrimination on the basis of national origin or citizenship status (*id.* § 1324b(a)(1)). Congress achieved this balance with deliberate precision: Congress imposed the exact same graduated scale of penalties for violating section 1324a (ban on hiring unauthorized workers) as for violating section 1324b (ban on discrimination). Thus, first offenders of section 1324a face penalties of $250 to $2000 (*id.* § 1324a(e)(4)(A)(i)), as do first offenders of section 1324b (*id.* § 1324b(g)(2)(B)(iv)(I)). Second offenders of each section both face penalties of $2000 to $5000, and third offenders of each section both face penalties of $3000 to $10,000. *Compare id.* § 1324a(e)(4)(A) *with id.* § 1324b(g)(2)(B)(iv).

Congress sought to preserve this balance when it subsequently enacted IIRIRA and established E-Verify as an experimental pilot program to verify electronically the employment authorization of newly hired employees. To limit the discrimination that E-Verify could cause, Congress made the program voluntary and temporary. When Congress renewed E-Verify in 2003, it kept the program voluntary as part of a comprehensive immigration policy that balanced the prevention of employment of unauthorized workers with the possibility of discrimination resulting from E-Verify.

Even if the goals of federal and state law are the same, a state law "is preempted if it interferes with the methods by which the federal statute was designed to

reach this goal." *Int'l Paper Co. v. Ouellette*, 479 U.S. 481, 494 (1987). Conflict preemption will invalidate a state statute that "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Geier v. American Honda Motor Co.*, 529 U.S. 861, 873 (2000). Although the Ninth Circuit held that the Arizona statute was not preempted, it relied on *De Canas v. Bica*, 424 U.S. 351 (1976), which pre-dates both the enactment of IRCA and this Court's decision in *Hoffman*. *Hoffman* held that the National Labor Relations Board could not award backpay to an unauthorized worker because such an award would "subvert[]" IRCA. 515 U.S. at 150. Here, the Arizona statute would just as surely subvert federal immigration policy.

The Arizona statute and other state laws make participation in E-Verify mandatory and permanent even though Congress made it voluntary and temporary. Requiring participation in E-Verify (and failing to include anti-discrimination provisions) upsets the careful balance struck by Congress, fundamentally altering the way Congress sought to address discrimination and the employment of unauthorized workers. In doing so, the Arizona statute and other similar state laws have become an obstacle, thwarting Congress' intended objective of minimizing discrimination caused by E-Verify. In fact, it appears that the Arizona statute has already resulted in the types of discrimination that Congress sought to avoid. Shortly after the Arizona statute was enacted in 2007, immigration lawyers, industry groups and employers

reported that they noticed "an increase in hostility toward Hispanic workers."[4]

As discussed below, Congress sought to minimize the discrimination resulting from E-Verify by keeping participation in E-Verify voluntary and temporary, at least until it could assess the potential effects of the program. The Arizona statute and similar state laws—which seek to short-circuit this process and force businesses to use E-Verify (to the exclusion of other verification options approved by Congress)—conflict with federal law and are preempted.

II. STATE LAWS REQUIRING MANDATORY PARTICIPATION IN E-VERIFY FRUSTRATE CONGRESS' INTENT TO BALANCE DISCRIMINATION CONCERNS WITH CONTROL OF ILLEGAL IMMIGRATION.

In IRCA, IIRIRA and related legislation, Congress deliberately intended to preempt state statutes like the Arizona statute. It did so in order to control the nation's borders and regulate the hiring of aliens, without causing discrimination against authorized workers who some may perceive as looking or sounding foreign. This rationale for making E-Verify voluntary and temporary is well documented: when it created E-Verify by passing IIRIRA, Congress mandated that the Attorney General submit reports on pilot programs to the House and Senate Judiciary Committees. The Attorney General delegated this responsibility to the Immigration and

4. Daniel González, *Taunts, Threats as Law Nears*, The Arizona Republic, Sept. 30, 2007, at A1.

Naturalization Service ("INS"), and in 2002, the Institute for Survey Research of Temple University and Westat prepared a report on behalf of the INS titled "Findings of the Basic Pilot Program Evaluation" (the "2002 Evaluation").[5]

The 2002 Evaluation describes the history of Congress' concern about discrimination and analyzes the relationship between E-Verify and discrimination. Congress had the report in hand when it passed legislation in 2003 to extend E-Verify through November 2008 and keep the program voluntary.[6] The threat of E-Verify-related discrimination has been, and continues to be, a major consideration for Congress in its decision to keep E-Verify voluntary and temporary.

A. Congress Was Concerned About Discrimination Both Before And During The Creation Of E-Verify.

In September 1996, IIRIRA created the "Basic Pilot" program, which is now called the E-Verify program. The program was first known as the "Basic

5. An electronic copy of the 2002 Evaluation may be found on the website of U.S. Citizenship and Immigration Services at: www.uscis.gov/portal/site/uscis/menuitem.5af9bb95919f35e66f614176543f6d1a/?vgnextoid=9cc5d0676988d010VgnVCM10000048f3d6a1RCRD&vgnextchannel=2e039e7755cb9010VgnVCM1000045f3d6a1RCRD.

6. *See* Basic Pilot Program Extension and Expansion Act of 2003, Pub. L. No. 108-156, 117 Stat. 1944 (Dec. 3, 2003) (extending term of E-Verify and expanding availability to all 50 states, but keeping program voluntary and temporary to permit further study and evaluation).

Pilot" because it was (and still is) a means for the INS (whose functions are now performed by three agencies under the newly created Department of Homeland Security ("DHS")) and Social Security Administration ("SSA") to evaluate on a pilot basis methods of electronically verifying the employment authorization of newly hired employees. Because of its pilot status, E-Verify was voluntary and experimental, and remains so to this day.[7] Initially, E-Verify was to run for four years; later legislation has reauthorized it on a temporary and voluntary basis.

From the time Congress first began considering employer sanctions and employment verification as a means to address the employment of unauthorized workers, it has been concerned about the discrimination that such legislative action could cause:

> • In its 1980 report to the President and Congress titled "The Tarnished Golden Door," the U.S. Commission on Civil Rights "recommended unequivocally against passage

7. A recently adopted federal regulation would make E-Verify mandatory for only certain federal contractors and subcontractors. Federal Acquisition Regulation, 73 Fed. Reg. 67,651 (Nov. 14, 2008); *see Chamber of Commerce v. Napolitano*, No. 8:08-cv-3444 (D. Md. filed Dec. 23, 2008) (challenging the legality of the regulation); Federal Acquisition Regulation, FAR Case 2007-013, Employment Eligibility Verification, 74 Fed. Reg. 26,981 (June 5, 2009) (extending effective date of regulation to September 8, 2009). That regulation, however, does not make E-Verify mandatory for all employers and certainly does not negate the concerns regarding discrimination that Congress expressed at the time it established E-Verify as a voluntary program.

of employer sanctions legislation" because the "likely consequences . . . would be ineffectiveness, prescreening of job applicants, discrimination, and placement of employers in the role of immigration officers." 2002 Evaluation at 7.

• On April 30, 1981, the Select Commission on Immigration and Refugee Policy issued a report about its "comprehensive study of the major facets of immigration law" and stated that any employment verification system should incorporate "uniform and nondiscriminatory application." 2002 Evaluation at 8.

• "As a result of years of debate and widely held concerns about the probable discriminatory impact of employer sanctions on foreign-appearing and foreign-sounding workers, IRCA included significant anti-discrimination provisions for unfair immigration-related employment practices." 2002 Evaluation at 9.

• "IRCA also included several reporting requirements. It charged the General Accounting Office (GAO) with preparing a series of three reports to determine if employer sanctions were carried out satisfactorily, if they caused a pattern of discrimination against U.S. citizens or other authorized workers, and if sanctions caused an unnecessary regulatory burden on employers . . . . On March 29, 1990, GAO issued its final report, finding that the implementation of employer sanctions had

resulted in a widespread pattern of discrimination against authorized workers and that a substantial amount of these discriminatory practices had apparently resulted from IRCA." 2002 Evaluation at 11-12 (footnote omitted). State and local studies and nongovernmental reports on employer sanctions likewise found that employer sanctions led to discrimination in the workplace. 2002 Evaluation at 13.

- "In [its] 1990 report to Congress indicating a pattern of widespread discrimination, GAO noted significant employer confusion on how to comply with the verification provisions." 2002 Evaluation at 27.

The legislative history of IRCA confirms the serious concern with which Congress has viewed the discrimination that could flow from employer sanctions. The House Report states, "Numerous witnesses over the past three Congresses have expressed their deep concern that the imposition of employer sanctions will cause extensive employment discrimination against Hispanic-Americans and other minority group members. These witnesses are genuinely concerned that employers, faced with the possibility of civil and criminal penalties, will be extremely reluctant to hire persons because of their linguistic or physical characteristics." H.R. Rep. No. 99-682(I), *as reprinted in* 1986 U.S.C.C.A.N. 5649, 5672. During the debate in Congress, it was observed that, "when an employer, particularly one who does not have elaborate personnel and legal departments, is faced with the potential of civil

and criminal penalties, that employer, for totally nonracist reasons, may, when in doubt with respect to the legal status of an applicant, decide to protect himself by excluding that applicant." 132 Cong. Rec. H9708-02 (daily ed. Oct. 9, 1986) (statement of Rep. Berman). *See also* 131 Cong. Rec. S11414-03 (daily ed. Sept. 13, 1985) (statement of Sen. Levin) ("We do not want people discriminated against because they look or sound foreign.").

The Executive Branch has also expressed concerns about potential discrimination caused by pilot programs such as E-Verify. In 1995, President Clinton issued a directive to the heads of all executive departments and agencies proposing a blueprint of policies and priorities for curtailing illegal immigration. That directive "reiterated that strong anti-discrimination measures must continue to protect the privacy and civil rights of all persons lawfully in the United States and directed an interagency effort to ensure that these rights were vigorously protected." 2002 Evaluation at 19.

In response to President Clinton's directive, in 1995 the Immigration Verification Subgroup of the Interagency Working Group on Immigration (the "Working Group") issued a report following "a lengthy consideration of complex issues related to discrimination and employment verification." The report stated that any review of employment verification pilot programs should "address potential discrimination in the design of the pilots themselves" and "ensure that an effective evaluation mechanism was in place to determine whether the pilots led to discrimination." 2002 Evaluation at 21. The Working Group report also recommended that "pilot

design should safeguard against prescreening of applicants prior to hire, selective or inconsistent implementation of the verification process, and unauthorized use of verification information for the purpose of harassment or discrimination."[8] 2002 Evaluation at 22.

In light of the concerns about discrimination, Congress specifically targeted discrimination in 1996 when it crafted IIRIRA and established E-Verify: "[T]he potential impact of automated employment verification on discrimination was a topic frequently discussed prior to the implementation of the pilots." 2002 Evaluation at 136. One of the four primary goals of the IIRIRA pilot programs, including E-Verify, was to "[r]educe discrimination." 2002 Evaluation at 28-29. IIRIRA itself provides for the establishment of "a pilot program confirmation system" designed and operated "to have reasonable safeguards against the system's resulting in unlawful discriminatory practices based on national origin or citizenship status, including— (A) the selective or unauthorized use of the system to verify eligibility; (B) the use of the system prior to an offer of employment; or (C) the exclusion of certain individuals from consideration for employment as a result of an perceived likelihood that additional verification will be required,

8. Also in 1995, the National Council of La Raza issued a major report entitled "Racing Toward Big Brother – Computer Verification, National ID Cards, and Immigration Control." The report indicated that new verification systems would likely result in discrimination and that stronger labor law, border enforcement and assistance to major sending countries would be preferable to employer sanctions and "discriminatory and unproven verification systems." 2002 Evaluation at 22.

beyond what is required for most job applicants." IIRIRA § 404(d)(4).

B. Before Deciding To Keep E-Verify Voluntary And Temporary, Congress Considered The Discrimination That Might Result From E-Verify.

When Congress passed the December 2003 legislation that extended E Verify for five years and maintained it as a voluntary, temporary program, Congress had the opportunity to review extensive analysis of the discrimination that had already resulted from employers' use of E-Verify as well as the additional discrimination that could result from continued and expanded use of E-Verify. *See, e.g.*, 149 Cong. Rec. H9896 (daily ed. Oct. 28, 2003) (statement of Rep. Sanchez) (describing, during debate on the Basic Pilot Program Extension and Expansion Act of 2003, the "many problems" with E-Verify found by the 2002 Evaluation, including "inaccurate and outdated information").[9] The 2002 Evaluation devotes an entire chapter to the impact of E-Verify on discrimination, determining that there was evidence that E-Verify caused discrimination. The 2002 Evaluation identifies numerous concerns regarding the links between E-Verify and discrimination:

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9. Also, subsequent federal studies may be relevant in determining whether a federal law preempts a state's action. In *Geier*, for example, this Court considered a 1995 analysis of airbag-related injuries in determining whether a 1984 Federal Motor Vehicle Safety Standard, promulgated by the Department of Transportation under a 1966 federal law, preempted a state tort claim. 529 U.S. at 878.

- "Among employers who said the pilot would make it less likely for employers to hire immigrants, the explanation most frequently mentioned (by approximately 40 percent of employers) was their reluctance to bear the cost of training individuals who later turn out to be non-work-authorized." *Id.* at 138. Indeed, "[t]here is . . . considerable evidence that Basic Pilot employers are using the system to prescreen applicants, although E-Verify prohibits prescreening." *Id.* at 143. And findings suggested "that some Basic Pilot employers are . . . disproportionately denying employment to those receiving tentative nonconfirmations."[10] *Id.* at 140.

- E-Verify uses databases containing either SSA or INS (now DHS) data. "Most Federal officials interviewed agreed that the efficient operation of the pilot program was hindered by inaccuracies and outdated information in the INS database."[11] 2002 Evaluation at 121.

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10. A tentative nonconfirmation is the initial response from E-Verify when an employee's work authorization cannot be immediately confirmed. It does not signify that an employee is not authorized to work and is not indicative of any immigration violation.

11. A 2006 SSA study found that approximately 17.8 million SSA records contained data mismatches that could result in E-Verify nonconfirmations. Office of the Inspector General, Social Security Administration, *Accuracy of the Social Security Administration's Numident File*, A-08-06-26100, December 2006, *available at* http://www.ssa.gov/oig/ADOBEPDF/A-08-06-26100.pdf.

"[I]naccuracies in the SSA and INS databases could result in some work-authorized persons being incorrectly identified as not work-authorized. Since these persons would most likely be disproportionately foreign-born, this misidentification would result in unintentional discrimination against foreign-born employees." *Id.* at 137.

• "Employee rights are violated when employers fail to hire individuals with tentative nonconfirmations, because the employees are not given the opportunity to resolve the nonconfirmation." 2002 Evaluation at 143. "Since foreign-born employees are more likely than native-born employees to receive tentative nonconfirmations, pre-employment screening can be expected to result in discrimination . . . ." *Id.* at 140.

• The 2002 Evaluation found that many employers who used E-Verify wrongfully restricted or suspended the employment of existing employees who had to contest tentative nonconfirmations: "The Basic Pilot MOU prohibits the restriction of work assignments, pay cuts and other adverse actions against employees while they are contesting tentative nonconfirmations. However, employers do sometimes take adverse actions against employees who receive tentative nonconfirmations." 2002 Evaluation at 117. "The possibility that the Basic Pilot program could contribute to post-

hiring discrimination has been of widespread concern." *Id.* at 144. "Since individuals receiving tentative nonconfirmations are disproportionately foreign-born . . . , the impact of these actions will be discriminatory even if the employer does not intend to discriminate . . . . [I]t is reasonable to conclude that failure to follow Basic Pilot procedures during the tentative nonconfirmation period has increased discrimination against foreign-born individuals compared to native-born individuals in the time immediately following hire." *Id.* at 145.

• The E-Verify databases contain errors that result in false tentative nonconfirmations for disproportionate numbers of Hispanics and Asians. *See* 2002 Evaluation at 137. In addition, "[s]ince Hispanics and Asians are more likely than whites and blacks to be foreign-born, discrimination against foreign-born (or foreign-appearing) individuals is likely to result in increased discrimination against Hispanics and Asians in particular, as well as against foreign-born individuals generally." *Id.*

• "[I]f employers believe that verifying noncitizens through the Basic Pilot system is more burdensome than verifying citizens, the pilot may increase disparate treatment of noncitizens." 2002 Evaluation at 137.

• "Many objections to verification of work authorization stem from the fear that employers will exploit the procedures to

> discriminate against noncitizens, foreign-appearing citizens, and members of specific ethnic groups." 2002 Evaluation at 135.

As a result, Congress extended E-Verify for only a temporary period and without making participation mandatory. Congress determined that it would accept the risk of discrimination only to the limited extent that discrimination resulted from a program that was voluntary, temporary and subject to ongoing study and revision. Congress decided not to tolerate the substantially greater discrimination that it feared would result from a mandatory and permanent program. Now, however, Arizona and other states have decided on their own that the risk of such discrimination is acceptable. By making E-Verify participation mandatory and permanent, the Arizona statute and other state laws thwart Congress' carefully considered policy of balancing controls on illegal immigration with the need to prevent discrimination against U.S. citizens and other authorized workers.

C. The Risk Of Discrimination From E-Verify Remains High.

Concerns regarding discrimination resulting from E-Verify were well founded. A follow-up study of E-Verify performed by Westat for the INS (now DHS) has recently confirmed that discrimination caused or exacerbated by E-Verify remains a significant concern.[12]

12. Although Congress has had the opportunity to make E-Verify participation mandatory for all employers each time it has extended the program, Congress has declined to do so, most recently in March 2009. *See* Pub. L. No. 110-329, 122 Stat. 3574, 3676 (2009).

According to this 2007 study, "[t]esting on a pilot basis was considered important because of the limitations of Federal data for verification purposes, the potential for workplace discrimination and privacy violations, and practical logistical considerations about larger scale implementation." Findings of the Web Basic Pilot Evaluation ("2007 Evaluation") at 5;[13] *see also* 154 Cong. Rec. H7589 (daily ed. July 30, 2008) (statement of Rep. Lofgren) (noting, during debate in 2008 on whether to extend E-Verify, that the 2007 Evaluation identified "numerous problems with how the basic pilot program works"). The 2007 Evaluation also observed that, while federal databases used for verification had improved, "further improvements are needed, especially if the Web Basic Pilot Program becomes a mandated national program. . . . Most importantly, the database used for verification is still not sufficiently up to date to meet the IIRIRA requirement for accurate verification, especially for naturalized citizens." 2007 Evaluation at xxi. "Reducing the erroneous tentative nonconfirmation rate for naturalized citizens will take considerable time and will require better data collection and data sharing between SSA, USCIS, and the U.S. Department of State than is currently the case." 2007 Evaluation at xxvi.

Erroneous tentative nonconfirmation rates due to database deficiencies are a critical shortcoming of E-Verify that result in discrimination. The 2007 Evaluation

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13. An electronic copy of the 2007 Evaluation may be found on the website of U.S. Citizenship and Immigration Services at: http://www.uscis.gov/files/article/WebBasicPilotRprtSept2007.pdf.

recognized that the "impact of receiving an erroneous tentative nonconfirmation on discrimination can be viewed as the product of two factors—the degree to which specified groups differ in their tentative nonconfirmation rates and the size of the negative impact of receiving erroneous tentative nonconfirmations on those receiving them." 2007 Evaluation at 96.

With respect to differences in tentative nonconfirmation rates, the 2007 Evaluation reported that the "erroneous tentative nonconfirmation rate for employees who were eventually found to be work-authorized is approximately 30 times higher for foreign-born employees than for U.S.-born employees." 2007 Evaluation at 97. Moreover, in the first half of fiscal year 2007, "[t]here are dramatic differences between the erroneous tentative nonconfirmation rates for foreign-born citizens and work-authorized noncitizens . . . ." *Id.* Put differently, naturalized citizens are disproportionately affected by E-Verify errors.

The "negative impact" of receiving a tentative nonconfirmation can be significant. As discussed, E-Verify procedures prohibit employers from taking action against workers based only on tentative nonconfirmations. Just as feared, however, some employers have chosen to disregard this prohibition, harming both citizens and other authorized workers. *See* 2007 Evaluation at 100.

For example, an employer in Phoenix—an owner of fast-food restaurants—testified before a House subcommittee that the Arizona statute, which includes stiff penalties, might cause employers to prefer

"applicants who look like they . . . are U.S. citizens."[14] Authorized workers who have received tentative confirmations have experienced discrimination even after they were hired. These employees are denied work assignments, denied job benefits, and fired from their jobs.[15] As a result of receiving a tentative nonconfirmation, one employee was terminated two hours after being hired.[16] Another person received a job offer only to see it rescinded after receiving a tentative nonconfirmation, even though he later offered the employer confirmation from the SSA that he was authorized to work in the United States.[17] Some employees did not receive training while contesting tentative nonconfirmations, and some employees were paid less. 2007 Evaluation at 77.

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14. Dena Bunis, *Employment verification days are numbered*, Orange County Register, May 6, 2008, *available at* http://www.ocregister.com/ocregister/news/local/immigration/article_2035598.php.

15. Moreover, a report by a non-profit immigrant rights program found that the Arizona statute "has produced fear and resentment in the immigrant community." Caroline Isaacs, Sanctioning Arizona: The Hidden Impacts of Arizona's Employer Sanctions Law, American Friends Service Committee, January 2009, available at http://www.afsc.org/tucson/ht/a/GetDocumentAction/i/74700.

16. Alexandra Marks, *With E-Verify, Too Many Errors to Expand Its Use?*, The Christian Science Monitor, July 7, 2008, *available at* http://www.csmonitor.com/2008/0707/p02s01-usgn.html.

17. *How Errors in Basic Pilot/E-Verify Databases Impact U.S. Citizens and Lawfully Present Immigrants*, National Immigration Law Center, April 2008, *available at* http://www.nilc.org/immsemplymnt/ircaempverif/e-verify_impacts_USCs_2008-04-09.pdf.

Congress was aware of these problems when it decided to keep E-Verify voluntary and mandated further evaluation. The Arizona statute and similar state laws directly frustrate Congress' intent not to require participation in E-Verify until steps are taken to considerably reduce the error rate and its harmful effects.

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Authorized workers who look or sound foreign face increased discrimination when employers are forced to participate in the flawed E-Verify system. Congress has historically considered such discrimination to be a significant problem. *See supra* Part II.A.

When Congress passed IRCA and implemented sanctions for employing unauthorized workers, Congress addressed its discrimination concerns by including anti-discrimination provisions in the legislation. Later, when Congress established E-Verify, it made the program temporary and voluntary. In light of evidence that E-Verify continues to result in discrimination, Congress has kept E-Verify temporary and voluntary. If the Arizona statute and other state laws that make E-Verify permanent and mandatory are allowed to stand, they will result in the very discrimination Congress sought to eliminate. These state laws would undermine Congress' intent to prevent such discrimination. They are therefore preempted by federal law.

CONCLUSION

For the foregoing reasons, the *amici curiae* respectfully submit that review should be granted.

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AMICUS CURIAE BRIEF

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Supreme Court of the United States

CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA *et al.*,
Petitioners,

v.

CRISS CANDELARIA *et al.*,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF BUSINESS ORGANIZATIONS AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

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Employment Verification—Challenges Exist in Implementing a Mandatory Electronic Employment Verification System: Hearing Before the Subcomm. on Social Security, H. Comm. on Ways & Means, 110th Cong. 4 (2008) 8, 9, 10

H.R. 1951, 110th Cong. § 3 (2007) 7

H.R. 98, 110th Cong. § 5(a) (2007) 7

H.R. Rep. No. 99-628, pt. 1 (1986) 5

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NSCL Immigrant Policy Project, State Laws Related to Immigrants and Immigration in 2008 (rev. Jan. 27, 2009) 14, 15

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NCSL Immigrant Policy Project, State Laws Related to Immigrants and Immigration, January 1 - June 30, 2009 (July 17, 2009) 14, 15

Office of the Inspector General, Social Security Administration, *Congressional Response Report: Accuracy of The Social Security Administration's Numident File* (2006) 9, 10

Westat, *Findings of the Web Basic Pilot Evaluation* (2007) 10, 11, 12

BRIEF OF BUSINESS ORGANIZATIONS AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

Amici curiae respectfully submit this brief in support of petitioners.[1]

INTEREST OF *AMICI CURIAE*

Amici curiae file this brief to inform the Court of the significance of this issue to businesses, large and small, in many industries. As representatives of the business community, *amici* emphasize the substantial burdens imposed on businesses by the Legal Arizona Workers Act and scores of varying laws recently enacted in other jurisdictions.

The Associated Builders and Contractors, Inc. ("ABC") is a national construction industry trade association representing nearly 25,000 individual employers in the commercial and industrial construction industry. ABC also has 78 chapters throughout the United States.

The Human Resource Initiative for a Legal Workforce ("HR Initiative") represents the views of human resource professionals in thousands of small and large U.S. employers representing every sector of the U.S. economy. HR Initiative members (the Ameri-

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[1] Pursuant to Rule 37.6, counsel for *amici curiae* states that no counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amici curiae*, their members, or their counsel made a monetary contribution to its preparation or submission. The parties received timely notice of *amici*'s intent to file this brief; all parties have consented to its filing, and letters reflecting their consent have been filed with the Clerk.

can Council on International Personnel, HR Policy Association, International Public Management Association for Human Resources, National Association of Manufacturers, and the Society for Human Resources Management) represent the front lines on employment verification and, as such, are fully committed to hiring only work-authorized individuals.

The U.S. Hispanic Chamber of Commerce ("USHCC") is the nation's largest business chamber that focuses on the needs and issues of Hispanic-owned businesses, employees and consumers. USHCC's membership includes companies and professional organizations of every size, in every industry sector, and from every region of the United States and Puerto Rico. It also serves as an umbrella organization for local, regional and statewide Hispanic chambers in the United States, Puerto Rico, Canada, Mexico, and South America.

The Chambers of Commerce of Illinois, Indiana, Kansas, Kentucky, New Jersey, and West Virginia; the Missouri Chamber of Commerce and Industry; the State Chamber of Oklahoma; the Pennsylvania Chamber of Business and Industry; the Tennessee Chamber of Commerce and Industry; the Texas Association of Business; and the Association of Washington Business are statewide organizations that are composed of and represent the interest of businesses, both large and small, as well as local chambers of commerce and other interested parties.

A brief initial word about the immigration debate underlying this case is in order. *Amici* steadfastly oppose the knowing employment of illegal immi-

grants. It is against federal law knowingly to employ illegal workers, and employers who violate this law are subject to an extensive (and exclusive) federal system of administration, adjudication, and penalty. The efficacy and wisdom of that choice, made by Congress more than 20 years ago, is not at issue here. The question presented by the petition in this case instead is whether Arizona and other states and localities may make a different choice than Congress. They may not.

INTRODUCTION AND SUMMARY

In the Immigration Reform and Control Act of 1986, Congress established a uniform and comprehensive national framework governing employment verification for immigrants. Congress sought to balance the objective of preventing employment of illegal aliens with other goals, including avoiding discrimination and limiting burdens on employees and employers. The existence of a single nationwide system of employment verification substantially reduces the costs of compliance for employers.

The Legal Arizona Workers Act frustrates Congress's objective of establishing a uniform framework that limits the imposition of unnecessary compliance and administrative costs on employers. It requires employers in the State to use a particular employment verification program, E-Verify, that Congress decided should be voluntary, not mandatory. Congress has repeatedly declined to mandate the use of E-Verify, and with good reason. E-Verify is inaccurate, costly and burdensome for employers, and often leads to extensive delays before legal employees can begin working.

In addition to mandating the use of E-Verify, Arizona's law imposes still further costs on businesses by imposing penalties on certain employers beyond those prescribed by federal law, and using its own adjudication system to determine whether employers have hired unauthorized workers. Those penalties include the forfeiture of a business license, which can be fatal to an employer.

The severe costs and burdens occasioned by Arizona's law are exacerbated by the patchwork of overlapping and contradictory laws enacted in other jurisdictions. States and municipalities have enacted scores of laws and ordinances regulating all aspects of employment verification. Some, like the Arizona law, mandate the use of E-Verify for some or all employers. Others purport to modify the requirements of the federal I-9 document verification program. Others create new adjudication schemes and standards, which depart from the system Congress enacted and impose harsh forms of civil and criminal sanctions on employers.

Each of these laws by itself imposes substantial costs on businesses that desire in good faith to comply with all applicable standards. Collectively, they impose an enormous financial and administrative burden on multi-state businesses, which must develop and maintain multiple, distinct compliance regimes throughout their fields of operation. This patchwork of state and local laws undermines Congress's intent to establish a comprehensive and uniform national framework that limits the imposition of undue burdens on businesses.

ARGUMENT

Over twenty years ago, Congress recognized that the employment of illegal aliens was a national problem requiring a national solution. In response, Congress enacted the Immigration Reform and Control Act of 1986 ("IRCA") to create a uniform and comprehensive national employment verification framework. *See* Pub. L. No. 99-603, 100 Stat. 3359 (codified as amended at 8 U.S.C. §§ 1324a, 1324b). The IRCA, as amended through subsequent statutes, *e.g.*, the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 ("IIRIRA"), Pub. L. No. 104-208, 110 Stat. 3009, establishes a "comprehensive scheme prohibiting the employment of illegal aliens in the United States." *Hoffman Plastic Compounds, Inc. v. NLRB*, 535 U.S. 137, 147 (2002).

Congress fashioned this "comprehensive scheme" in a manner sensitive to several competing considerations. *See Nat'l Ctr. for Immigrants' Rights, Inc. v. INS*, 913 F.2d 1350, 1366 (9th Cir. 1990), *rev'd on other grounds*, 502 U.S. 183 (1991) (observing that the statute represents "a carefully crafted political compromise which at every level balances specifically chosen measures discouraging illegal employment with measures to protect those who might be adversely affected"). In particular, Congress established a nationwide system that would be "least disruptive to the American businessman." H.R. Rep. No. 99-628, pt. 1, at 56 (1986), *reprinted in* 1986 U.S.C.C.A.N. 5649, 5660. Congress's sensitivity to the burden on employers pervaded its deliberations. *See Collins Food Int'l, Inc. v. INS*, 948 F.2d 549, 554 (9th Cir. 1991) ("[T]he legislative history of section 1324a indicates that Congress intended to minimize

the burden and the risk placed on the employer in the verification process."). Congress accordingly required the GAO to prepare a report to determine whether "an unnecessary regulatory burden has been created for employers," IRCA § 101(j), and established a joint taskforce to review this and other reports and make follow-up recommendations, *id.* § 101(k). As a result of Congress's concern for the interests of businesses, it ultimately adopted a framework that is "fair to decent and honest employers, but at the same time, ensure[s] that repeat offenders will be subject to strong civil and criminal penalties." 132 Cong. Rec. H10,584 (daily ed. Oct. 15, 1986) (statement of Rep. Rodino).

The Legal Arizona Workers Act interferes with Congress's establishment of a comprehensive and uniform employment verification framework. Contrary to Congress's wishes, Arizona's law places substantial costs on businesses through mandating use of the E-Verify program—which Congress deliberately specified should be voluntary—and imposing additional sanctions above those permitted by federal law. The burdens imposed on businesses are magnified many times over by a patchwork of new immigration provisions enacted by states and municipalities in recent years. The competing and inconsistent requirements undermine Congress's intent to establish a uniform comprehensive framework that would be "least disruptive" to American businesses.

I. THE ARIZONA STATUTE SUBJECTS BUSINESSES TO BURDENSOME REQUIREMENTS AND UNDULY HARSH SANCTIONS

The Arizona law requires "every employer" in the state to use E-Verify, a flawed and burdensome electronic employee verification program. *See* Ariz. Rev. Stat. § 23-214(A). Congress created E-Verify (then known as the "Basic Pilot Program") as one of three voluntary and experimental employment verification programs to supplement the standard federal I-9 document verification system. *See* 8 U.S.C. § 1324a note. From the outset, Congress prescribed that employer participation in E-Verify be strictly voluntary. *See* IIRIRA, Pub. L. No. 104-208, 110 Stat. 3009, § 402(a) (1996) ("the Attorney General *may not require* any person or other entity to participate in" E-Verify) (emphasis added); *see also id.* § 402(d)(2), (3)(A) (repeatedly noting the "voluntary nature" of the program). Moreover, as Congress has continued to study E-Verify, it has repeatedly declined to enact legislation that would require private employers to use the program. *See, e.g.*, H.R. 98, 110th Cong. § 5(a) (2007); H.R. 1951, 110th Cong. § 3 (2007); *Electronic Employment Verification Systems: Needed Safeguards to Protect Privacy and Prevent Misuse, Hearing Before the Subcomm. on Immigration, Citizenship, Refugees, Border Security, and Int'l Law of the H. Comm. on the Judiciary*, 110th Cong. (June 10, 2008).[2] Congress has kept E-Verify strictly vol-

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[2] Certain federal agencies recently promulgated a regulation mandating the use of E-Verify by certain federal contractors and sub-contractors. Federal Acquisition Regulation, 73 Fed. Reg. 67,651 (Nov. 14, 2008) (to be codified at 48 C.F.R. pts.

untary for good reason: the program yields inaccurate results and imposes significant burdens.

1. Employers who participate in E-Verify must use the Internet to check their employees against a federal database of presumably valid Social Security numbers. *See* Expansion of the Basic Pilot Program, 69 Fed. Reg. 75,997, 75,998 (Dec. 20, 2004); E-Verify Memorandum of Understanding ("MOU"), *available at* http://www.uscis.gov/files/nativedocuments/MOU.pdf. Many employees cannot be immediately confirmed as work-authorized because the information their employer enters into the system fails to match records contained in the federal database. *See Employment Verification—Challenges Exist in Implementing a Mandatory Electronic Employment Verification System: Hearing Before the Subcomm. on Social Security, H. Comm. on Ways & Means*, 110th Cong. 4 (2008) (statement of Richard M. Stana, Government Accountability Office) ("GAO Testimony"); *see also* E-Verify Statistics, http://www.uscis.gov/portal/site/uscis/menuitem.5af9bb95919f35e66f614176543f6d1a/?vgnextoid=f82d8557a487a110VgnVCM1000004718190aRCRD&vgnextchannel=a16988e60a405110VgnVCM1000004718190aRCRD. For any employee whom the database—

2, 22, 52). The rule, however, does not require the use of E-Verify for private employers other than those contracting with the federal government, nor does it authorize states to require E-Verify in any circumstances. Indeed, the rule's narrow application only underscores that E-Verify is voluntary except where explicitly made mandatory. And in any event, the lawfulness of that limited regulation is currently being challenged. *See Chamber of Commerce v. Napolitano*, No. 8:08-cv-3444 (D. Md. filed Dec. 23, 2008).

and, in the case of non-citizens, an immigration official—fails to clear, E-Verify provides a "tentative" nonconfirmation of work authorization status.

Many U.S. citizens and other authorized employees are the subject of a tentative nonconfirmation for a variety of reasons, including mistakes on the Form I-9 by the employer or employee, inaccurate data entry by the employer, or—as in the majority of cases—outdated government records due to a legal change of the employee's name, citizenship status, or other identifying information. Pilot Programs for Employment Eligibility Confirmation, 62 Fed. Reg. 48,309, 48,312 (Sept. 15, 1997); *see also* GAO Testimony, *supra*, at 4. Such mistakes are commonplace. Indeed, the Social Security Administration ("SSA") itself has acknowledged that its "Numident" file—the database on which E-Verify principally relies—contains inaccuracies that could result in the communication of incorrect work authorization information to employers on a widespread scale. *See* Office of the Inspector General, Social Security Administration, *Congressional Response Report: Accuracy of The Social Security Administration's Numident File* ii (2006), *available at* http://www.ssa.gov/oig/ADOBEPDF/A-08-06-26100.pdf. After reviewing a sample of 2,430 Numident records and finding 136 that contained errors, for example, the agency estimated that 4.1 percent of its file—or 17.8 *million* records—could result in "incorrect feedback" when submitted through E-Verify. *Id.*

Even the Department of Homeland Security ("DHS"), which administers the program, has recognized E-Verify's serious flaws. A recent study commissioned by the Department found that "the data-

base used for verification is still not sufficiently up to date to meet the IIRIRA requirement for accurate verification." *See* Westat, *Findings of the Web Basic Pilot Evaluation* xxi (2007), *available at* http://www.uscis.gov/files/article/WebBasicPilotRprtSept2007.pdf. And while SSA and DHS can conduct a manual review to determine whether a particular tentative nonconfirmation is erroneous, that process is time-consuming and can lead to discrimination against foreign-born, work-authorized employees. *Id.* The DHS-commissioned study thus concluded that "improvements are needed" before E-Verify can become "a mandated national program." *Id.*

The error rate is particularly acute for foreign-born employees. Because SSA does not automatically update the citizenship status of aliens who become naturalized citizens, as many as 3.3 *million* non-U.S. citizen records contain out-of-date citizenship status information, a significant problem that has caused the agency itself to express concern about "the extent of incorrect citizenship information" in the Numident file. *See* Office of the Inspector General, *Congressional Response Report*, *supra*, at ii. Because E-Verify relies on government databases including the SSA's, naturalized, work-authorized citizens with outdated SSA files may receive a temporary nonconfirmation, requiring them to contact the United States Citizenship and Immigration Services ("USCIS") or travel to an SSA field office to correct their records. *See* GAO Testimony, *supra*, at 13; *see also* E-Verify Statistics, *supra*. In the end, foreign-born, work-authorized employees—whether naturalized citizens or work-authorized non-citizens—are 30 times more likely to receive an er-

roneous tentative nonconfirmation than someone born in the United States. *See* Westat, *Findings of the Web Basic Pilot Evaluation*, *supra*, at xv.

2. E-Verify's significant error rate places substantial burdens on participating employers and their employees—burdens that will only increase as a result of statutes, like Arizona's, that make the program mandatory. E-Verify's rules prohibit an employer from taking adverse action against an employee who receives a tentative nonconfirm result for eight to ten days, in order to allow the employee to contest the results with the federal government. *See* Pilot Programs, 62 Fed. Reg. at 48,312. The employer must further suspend action during a subsequent period "while SSA or [DHS] is processing the verification request," MOU at ¶¶ II.C.10, and the average length of time for resolving these challenges ranges from 19 to 74 days, *see* Westat, *Findings of the Web Basic Pilot Evaluation*, *supra*, at 78-79. Throughout that period, "the employer may not terminate or take adverse action against the employee based upon his or her employment eligibility status." Pilot Programs, 62 Fed. Reg. at 48,312. The employer cannot even withhold training from the employee. E-Verify thus injects considerable uncertainty and delay into employers' investments in hiring and training new employees. *See* Westat, *Findings of the Web Basic Pilot Evaluation*, *supra*, at 68. And employers incur significant costs as a result of employees' travelling to SSA field offices in an attempt to resolve errors. *Id.* at 78-79.

Employers have identified a litany of other problems with E-Verify. These include technical pitfalls such as system unavailability, difficulty accessing

the system, and failure of passwords to function. *Id.* at xxii, 66. More systemic problems also exist. For example, employers have complained about their interactions with SSA and USCIS, observing that local agency representatives made mistakes and were unresponsive and unfamiliar with E-Verify. *Id.* at 66. Employers also must spend extra time on paperwork required by the program and travel long distances to SSA field offices, and have difficulty meeting the program's tight deadlines. *Id.* at 68. Even when it operates without flaws, E-Verify takes a financial toll on businesses, who must acquire, set up, and maintain computer systems, and train personnel in the program. *Id.* at 104-06. Those problems place a special burden on small businesses, who lack the means adequately to staff and maintain the program, and who find themselves at risk of noncompliance and the resulting substantial penalties.

Given these burdens, it is hardly surprising that most employers have declined to volunteer to use E-Verify. *Id.* at xxi.

3. The Arizona statute also establishes an independent, state proscription against hiring unauthorized aliens, which it enforces with sanctions that go beyond those authorized by federal law. *See* Ariz. Rev. Stat. § 23-212. Like its mandated use of E-Verify, the Act's punitive enforcement scheme places significant burdens on businesses.

The consequences of a violation are severe. An employer's first violation is punished by the imposition of a mandatory probationary period, during which the business must comply with additional reporting requirements for each new employee it hires;

the state court may also order the suspension, for a ten-day period, of the employer's "licenses"—which the Act defines broadly to include charters, articles of incorporation, and other foundational documents. *Id.* §§ 23-212(F)(1), 23-211(9). The penalty for a second violation is the permanent and immediate revocation of the employer's business licenses, at the location where the unauthorized alien worked or—if the employer has no license specific to that location—at the employer's primary place of business. *Id.* § 23-212(F)(2). The practical effect of that punitive sanction, deemed the "business death penalty" by Arizona's then-governor, see Pet. at 9, is to end the very existence of some businesses.

II. THE PATCHWORK OF STATE AND LOCAL IMMIGRATION LAWS IS BURDENSOME AND COSTLY FOR BUSINESS

Arizona's law is but one example of a growing multitude of similar efforts by States and localities to establish their own rules governing verification of immigrants' employment eligibility. States and cities have modified the federal electronic or document verification requirements, developed their own adjudication and enforcement mechanisms, and imposed their own sanctions and penalties. Each one of these laws places concrete burdens on businesses that operate in the jurisdiction. Taken together, the patchwork of conflicting and costly standards and requirements threatens to overwhelm multi-state businesses.

1. a. In recent years, state legislatures have enacted a growing deluge of laws regulating various aspects of immigration. The National Conference of

State Legislatures ("NCSL") has prepared yearly reports collecting and cataloguing the laws:

- In 2005, 300 immigration-related bills were introduced and 38 laws were enacted.
- In 2006, activity doubled: 570 bills were introduced and 84 laws were enacted.
- In 2007, activity tripled: 1,562 bills were introduced and 240 laws were enacted.
- In 2008, activity remained at this high level: 1305 bills were considered and 206 were enacted.
- In the *first half* of 2009 alone, "state legislation related to immigration topped last year's totals": more than 1400 bills have been considered in all 50 states; at least 144 laws have been enacted in 44 states; 285 bills and resolutions have passed legislatures; and 23 bills are pending Governor's approval.

NCSL 2009 Report[3] at 1.

These laws cover a number of topics, ranging from law enforcement to identification to education and benefits. But in each of these recent years, laws regulating employment of immigrants number among the most frequently introduced and enacted. *See, e.g.*, NCSL 2008 Report[4] at 1 (stating that "[a]s

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[3] NCSL Immigrant Policy Project, State Laws Related to Immigrants and Immigration, January 1 - June 30, 2009 (July 17, 2009), *available at* http://www.ncsl.org/documents/immig/ImmigrationReport2009.pdf.

[4] NSCL Immigrant Policy Project, State Laws Related to Immigrants and Immigration in 2008 (rev. Jan. 27, 2009),

in recent years, the top three areas of interest are identification/driver's licenses, employment and law enforcement"). Thus, according the NCSL, 244 employer-related immigration bills were introduced in 45 states in 2007, and 20 states enacted legislation. NCSL 2007 Report[5] at 2, 7-10. In 2008, 13 states enacted 19 more employer-related immigration laws. NCSL 2008 Report, *supra*, at 5-8. And in the first half of 2009, ten laws were enacted in seven states, and four additional laws are pending before state governors. *See* NCSL 2009 Report, *supra*, at 3-4. Those totals do not even include municipal ordinances and resolutions.

b. This patchwork of immigration employment laws, which impose a variety of requirements inconsistent with those authorized by Congress, defies easy categorization. This is all the more reason that the Court's review is important; the different nature of these mandates, as much as their increasing prevalence, imposes just the sort of costly compliance burdens that Congress intended to prevent when it implemented a national system. These include:

* *Requiring certain employers to use E-Verify.* As explained above, Arizona's law explicitly requires employers to use E-Verify, even though Congress deliberately made the program voluntary. A number of other States and local jurisdictions have enacted

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available at http://www.ncsl.org/Portals/1/documents/immig/StateImmigReportFinal2008.pdf.

[5] NCSL Immigrant Policy Project, 2007 Enacted State Legislation Related to Immigrants and Immigration (rev. Jan. 31, 2008), *available at* http://www.ncsl.org/print/immig/2007Immigrationfinal.pdf.

provisions that likewise govern employers' use of E-Verify. Mississippi also explicitly requires employers to use the program.[6] Colorado, Minnesota, Missouri, Georgia, Rhode Island, and certain municipalities explicitly or effectively require state contractors to participate in the program.[7] Other states, including Oklahoma and Utah, require certain employers to use a state-created employment verification system.[8] Illinois, in direct contrast, forbade employers in the state from using E-Verify, *see* 820 Ill. Comp. Stat. 55/12, but a court has since held that federal law preempted that ban, *see United States v. Illinois*, No. 07-3261, 2009 WL 662703 (C.D. Ill. Mar. 12, 2009).

* *Overriding the federal I-9 document verification system.* Still other jurisdictions effectively override the federal I-9 document verification system by altering the numbers and types of documents required, or the scope of employees covered. Tennessee and Louisiana regulate the number and types of docu-

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[6] Miss. S.B. 2988 § 2(3)(d), 2(4)(b)(i), Reg. Session (2008).

[7] *See* Colo. Rev. Stat. §§ 8-17.5-101(3.3), 8-17.5-102(1), (5)(c)(I)–(III); Minn. Exec. Order 08-01 (Jan. 7, 2008); Mo. Rev. Stat. §§ 285.525(6), 285.530(2); Ga. Code Ann. § 13-10-91(b); R.I. Exec. Order 08-01 (Mar. 27, 2008); S.C. H.B. 4400 §§ 3, 19 (codified at S.C. Code Ann. §§ 41-8-20(B)(1), 8-14-10(A)(4), 8-14-20(B)(1)); Ordinance No. 2006-18 § 4(D) (Hazelton, Pa.); Ordinance No. 2006-005 § 4(D) (Bridgeport, Pa.); Ordinance No. 1736 § 4(D) (Valley Park, Mo.); Resolution No. 2006-R-106 (Cherokee County, Ga.); Ordinance No. 07-02 § 2-3-D-13 (Dorchester County, S.C.); Ordinance No. 07-260 (Mission Viejo, Cal.).

[8] Utah Code Ann. § 63G-11-103(1)(c), (3)(a); Okla. Stat. tit. 25, §§ 1312, 1313(B)(2).

ments employers can use to verify work authorization status.[9] Georgia and South Carolina impose special tax withholding requirements on employers who fail to collect additional information from employees beyond that required in the federal I-9 employment verification process.[10] South Carolina requires some private businesses who do not use E-Verify to hire only those employees who meet the state's driver license eligibility requirements. 2008 S.C. Laws Act 280 (H.B. 4400) § 19 (codified at S.C. Code Ann. § 41-8-20(B)(2)(b)–(c), (C)). And Oklahoma's law effectively requires an employer to verify the employment eligibility of a non-employee independent contractor, Okla. Stat. tit. 68, § 2385.32, even though federal law excludes contractors from the I-9 process, *see* 8 C.F.R. § 274a.1(f)–(g)). Hazleton, Pennsylvania likewise attempted to require document verification for independent contractors. *See Lozano v. City of Hazleton*, 496 F. Supp. 2d 477, 526 (M.D. Pa. 2007).

* *Authorizing state officials to adjudicate employer compliance under altered standards.* In addition to imposing document or electronic verification requirements on employers that depart from those prescribed by federal law, some recently enacted statutes instruct state officials to make their own independent evaluations about an employer's compliance. The challenged Arizona law allows a *state* judge to determine whether employers have violated

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[9] Tenn. Code Ann. § 50-1-106; La. Rev. Stat. Ann. § 23:992.2.

[10] Ga. Code Ann. § 48-7-101(i); S.C. H.B. 4400 § 8 (codified at S.C. Code Ann. § 12-8-595(A)–(B)).

the hiring prohibition. Ariz. Rev. Stat. § 23-212(A). Oklahoma subjects employers to the state administrative machinery that attends charges of discrimination. *See* Okla. Stat. tit. 25, § 1313(C). Those types of provisions conflict with the elaborate administrative review system enacted by Congress to determine whether an employer knowingly employed an illegal alien. *See* 8 U.S.C. § 1324a(e)(3); 28 C.F.R. pt. 68. Moreover, whereas the IRCA permits federal sanctions only if an employer "knowingly" hires an unauthorized alien, State and local laws have lowered the scienter requirement, sometimes permitting employers to be held liable based on a standard of mere "reckless[ness]"[11] or "negligence,"[12] or even strict liability.[13]

* *Imposing additional penalties and sanctions.* A number of states impose a range of additional penalties on employers, beyond those authorized by federal law. Some jurisdictions allow civil and criminal penalties, including fines and even imprisonment, for employers they find to have hired illegal immi-

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[11] Miss. S.B. 2988 § 2(8)(c)(i).

[12] Utah Code Ann. § 63G-11-103(4)(a)(i).

[13] La. Rev. Stat. Ann. § 23:992; Ordinance No. 2006-18 § 4(A) (Hazelton, Pa.); Ordinance No. 2006-005 § 4(A) (Bridgeport, Pa.); Ordinance No. 07-02 § 23.C (Dorchester County, S.C.). Hazelton amended its ordinance after it was attacked in litigation. Ordinance No. 2007-6 (Hazelton, Pa.); *see Lozano*, 496 F. Supp. 2d at 484-85 & n.2. But strict liability regimes remain in force in Louisiana, Bridgeport, and Dorchester County.

grants.[14] Other states have created new types of legal liability for employers through the tort system. Oklahoma, for example, subjects employers to a discrimination claim on behalf of any discharged employee if the employer "reasonably should have known" that a retained employee is an unauthorized alien. Okla. Stat. tit. 25, § 1313(C). Louisiana, Mississippi, South Carolina, Utah, and certain municipalities have created similar tort claims[15] Arizona, along with other states, punishes violations through suspension or revocation of a business's "licenses," including withdrawal of its charter.[16] And Colorado, Georgia, Missouri, and South Carolina bar businesses from deducting wages paid to known unauthorized workers as a business expense on state income tax forms.[17]

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[14] La. Rev. Stat. Ann. § 23:993; W. Va. Code § 21-1B-5; Local Law No. 52-2006 § 8 (Suffolk County, N.Y.).

[15] La. Rev. Stat. Ann. § 23:994; Miss. S.B. 2988 § 2(4)(d); S.C. H.B. 4400 § 12 (codified at S.C. Code Ann. § 41-1-30); Utah Code Ann. § 63G-11-103(4); Ordinance No. 2006-18 § 4(E)(2) (Hazelton, Pa.); Ordinance No. 2006-005 § 4(E)(2) (Bridgeport, Pa.). Still additional jurisdictions threaten either direct or tort liability on businesses not using Basic Pilot. *See* Ga. Code Ann. § 48-7-21.1(b)–(c)(1); Miss. S.B. 2988 § 2(4)(d)–(e); S.C. H.B. 4400 §§ 12, 19 (codified at S.C. Code Ann. §§ 12-6-1175(B), (F) (tax), 41-1-30(A), (E) (tort), 41-8-20, -30, -40 (direct)); Utah Code Ann. § 63G-11-103(4)(a)–(b); Ordinance No. 07-02 §§ 23.C, 23.D.5 (Dorchester County, S.C.).

[16] *See* Ariz. Rev. Stat. § 23-212; *see also, e.g.*, Miss. Code Ann. 71-11-3(7)(e); Mo. Rev. Stat. §§ 285.525, 285.530; W. Va. Code § 21-1B-7.

[17] Colo. Rev. Stat. § 39-22-529(2); Ga. Code Ann. § 48-7-21.1(b); Mo. Rev. Stat. § 285.535(14); S.C. Code Ann. § 12-6-1175(B).

That is a small sampling of the patchwork of immigration-related employer requirements recently enacted by States and municipalities, whose validity is ultimately at issue here.

2. The rash of new laws places significant administrative, compliance, and punitive costs on businesses. To begin with, the patchwork of laws causes considerable confusion for employers and employees alike. It is difficult enough for businesses to stay informed of the steady flow of new legal requirements, let alone to develop compliance programs that keep pace with the unpredictable and ever-changing legal landscape. Moreover, the range of distinct verification regimes in different jurisdictions imposes substantial administrative costs on businesses, particularly on human resources and legal offices. At a minimum, businesses must devote significant resources simply to monitor, understand, and attempt to comply with these laws. And when businesses are unable to adapt their verification systems to a new law in any given state, they face harsh sanctions and penalties, even if they remain in full compliance with federal law. Of course, employers all the while must abide by the IRCA and its implementing regulations.

The Court should consider the petition in the context of the full range of state and local regulations. Permitting Arizona's law to remain standing would also leave in place numerous provisions enacted by other States and localities as well, and, indeed, could encourage other jurisdictions to enact still further employment verification regulations. The cumulative effect of all of those laws strongly counsels in favor of granting the petition.

Indeed, this Court has emphasized the need to maintain that sort of global perspective in the area of preemption. In *Rowe v. New Hampshire Motor Transport Ass'n*, the Court held that Maine's effort to establish rules affecting the shipment of tobacco products in the State was preempted by federal law (the Federal Aviation Administration Authorization Act of 1994). 128 S. Ct. 989 (2008). In finding the law preempted, the Court explained that "allow[ing] Maine to insist that the carriers provide a special checking system would allow other States to do the same." *Id.* at 996. And a decision that "federal law ... permit[s] these, and similar, state requirements could easily lead to a patchwork of state ... laws, rules, and regulations." *Id.* In *Rowe*, the Court considered "[t]hat state regulatory patchwork [to be] inconsistent with Congress' major legislative effort ...." *Id.; see also Buckman Co. v. Plaintiffs' Legal Comm.*, 531 U.S. 341, 350 (2001) (considering the consequences of "50 States' tort regimes"); *Bonito Boats, Inc. v. Thunder Craft Boats, Inc.*, 489 U.S. 141, 161 (1989) (considering the "prospect" of action by "all 50 States").

Here, likewise, the Court should approach the petition in this case with the understanding that denying review of Arizona's law "could easily lead to a patchwork of state" and local laws. That "regulatory patchwork" has already become a reality, one that places significant and growing burdens and penalties on businesses that endeavor in good faith to comply with federal law.

CONCLUSION

The Court should grant the petition for a writ of certiorari.

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August 27, 2009

AMICUS CURIAE BRIEF

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IN THE

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CHAMBER OF COMMERCE
OF THE UNITED STATES OF AMERICA, *et al.*,
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v.

CRISS CANDELARIA, *et al.*,
Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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BRIEF OF *AMICI CURIAE* NATIONAL EMPLOYMENT LAW PROJECT, SERVICE EMPLOYEES INTERNATIONAL UNION, AND LEGAL AID SOCIETY - EMPLOYMENT LAW CENTER IN SUPPORT OF PETITIONERS

INTEREST OF *AMICI CURIAE* [1]

The *amici curiae* listed below are non-profit organizations that share a common interest in the

[1] No person other than the *amici curiae* or their counsel has made any monetary contribution to the preparation or submission of this brief. Further, no counsel for any party authored this brief in whole or in part. Counsel of record for all parties have consented to the filing of this brief, and the letters of consent have been filed with, or will be sent to, the Clerk.

right of employees, including immigrant employees, to be free from discrimination and arbitrary treatment by employers:

- National Employment Law Project
- Service Employees International Union
- Legal Aid Society - Employment Law Center

Amici share the view of the 1986 Congress, which enacted the Immigration Reform and Control Act ("IRCA"), that if sanctions against employers for hiring unauthorized aliens substantially exceed the sanctions against employers for discriminating against aliens who are authorized to work in the United States, many employers, out of economic self-interest, will engage in discrimination against authorized applicants for work who look or sound foreign. *Amici* all have a demonstrated interest in preventing the adoption or enforcement of state or local laws, including the Legal Arizona Workers Act, that, by imposing ruinous sanctions on employers who hire unauthorized aliens, undermine the balance struck by the IRCA Congress between the need to deter employers from hiring unauthorized aliens and the need to deter employers from engaging in discrimination against authorized aliens who may look or sound foreign.

The specific interest of each amicus is as follows:

The **National Employment Law Project** ("NELP") is a non-profit organization that has worked for 40 years to advance the workplace rights of low-wage workers, including immigrant workers. Both directly and through its network with local community groups, labor unions and legal services organizations, NELP has advocated for thousands of immigrant workers to ensure their labor and

employment rights are upheld. NELP staff members have written, lectured, litigated, and engaged in policy advocacy on behalf of low-wage immigrant workers throughout the United States.

The **Service Employees International Union** ("SEIU") is an international labor organization that represents more than 2 million members employed in the private and public sectors, including many who are immigrant aliens authorized to work in the United States. As set out in SEIU's Constitution, it is an essential part of SEIU's mission to act as an "advocacy organization for working people" and to oppose, not only "discrimination based on gender, race, ethnicity, religion, age, sexual orientation and physical ability," but also discrimination on "immigration status."

The **Legal Aid Society - Employment Law Center** ("LAS-ELC") is a San Francisco-based nonprofit public interest law firm that, for over 35 years, has litigated on behalf of the workplace rights of communities of color, women, individuals with disabilities, and the working poor. LAS-ELC has substantial expertise in the area of immigrant workers' rights.

SUMMARY OF ARGUMENT

The Immigration Reform and Control Act of 1986 ("IRCA"), 8 U.S.C. §§ 1324a *et seq.*, was the product of years of deliberations and of difficult compromises that carefully balanced myriad competing policy and political concerns touching on the question of the rules of conduct and the sanctions that should be imposed in the area of employment of unauthorized aliens.

Of particular importance from the perspective of the employment-rights and labor *amici* here, Congress balanced section 1324a's ban on knowingly hiring unauthorized workers with section 1324b's prohibition against discrimination in employment on the basis of alienage, *id.* 1324b(a)(1). Indeed, Congress balanced those provisions with perfect precision, in that Congress imposed the exact same graduated scale of penalties on offenders of each section. Congress did so out of the concern that a regime that penalized the employment of unauthorized aliens without equally penalizing discrimination against authorized aliens, would skew employer decisionmaking: employers, acting out of economic self-interest, would be tempted to minimize their risk of being subjected to IRCA's employer sanctions by rejecting foreign-seeming job applicants without troubling to determine whether each particular applicant was or was not authorized for work.

The sanctions provisions of the "Legal Arizona Workers Act," Ariz. Rev. Stat. §§ 23-211 to 23-216, destroy Congress' careful balance by, on the one hand, imposing the "business death penalty"—revocation of one's license to do business—on employers who hire unauthorized aliens, but, on the other hand, imposing no penalty at all on those who discriminate against authorized aliens. The Arizona statute thus will skew employer decisionmaking in the precise manner that Congress sought to avoid and will stand as a significant obstacle to the accomplishment of the IRCA Congress' intended purposes.

Notwithstanding the obstacle that the Arizona statute poses to IRCA's purposes, the Ninth Circuit upheld it against Petitioners' preemption challenge by giving the most expansive reading possible to the

seven-word parenthetical savings clause set out in IRCA's express preemption provision. *See Chicanos Por La Causa, Inc. v. Napolitano*, 558 F.3d 856 (9th Cir. 2009), Pet. App. 1a-25a.

In adopting an interpretation of IRCA that would make it so easy to upset IRCA's delicate balance, the Ninth Circuit disregarded controlling precedents of this Court that establish two basic principles applicable to statutes such as IRCA that contain an express preemption clause with a "savings clause" exception: First, where a broad reading of the savings clause would allow states to thwart the purposes of the substantive provisions of the statute, the Court should, if possible, construe the savings clause narrowly so as to avoid that threat. *See Pilot Life Insurance Co. v. Dedeaux*, 481 U.S. 41, 54 (1987). Second, where such a narrowing construction is unavailable and hence the state law is saved from *express* preemption, the Court will test the law in question under ordinary *implied* conflict preemption principles and invalidate the state law if it "stands as an obstacle to the accomplishment and execution of the full purposes and objectives" of the federal statute. *Geier v. Honda Motor Co.*, 529 U.S. 861, 872 (2000).

On a proper application of those principles, the Arizona statute cannot survive Petitioners' preemption attack.

ARGUMENT

The writ should be granted because this case presents a question of exceptional national importance, and the Ninth Circuit's decision conflicts with this Court's precedents both in the areas of statutory construction generally and in the specific area of

construing federal statutes to determine their preemptive effect on state and local laws.

1. The Immigration Reform and Control Act of 1986 ("IRCA"), 8 U.S.C. §§ 1324a *et seq.*, was the product of years of deliberations and of difficult compromises that carefully balanced myriad competing policy and political concerns touching on the question of the rules of conduct and the sanctions that should be imposed in the area of employment of unauthorized aliens. *See* Pet. at 5-16, 12-13. Thus, while Congress prohibited employers from hiring unauthorized aliens, it included a strict *scienter* requirement (that the employer "knowing[ly]" hired an unauthorized alien), 8 U.S.C. § 1324a(a)(1)(A); imposed relatively mild penalties for initial infractions, *id.* § 1324a(e)(4); and, of particular importance from the perspective of the employment-rights and labor *amici* here, balanced section 1324a's ban on knowingly hiring unauthorized workers with section 1324b's prohibition against discrimination in employment on the basis of alienage, *id.* 1324b(a)(1).

In this last regard, it is worth emphasizing that section 1324a's ban on knowingly hiring unauthorized workers is not merely balanced in some general way by section 1324b's prohibition against alienage discrimination, it is balanced with *perfect precision*, in that Congress imposed the exact same graduated scale of penalties on offenders of each section. Thus, first offenders of the knowing-hiring prohibition face penalties of $250 to $2000, 8 U.S.C. § 1324a(e)(4)(A)(i), as do first offenders of the prohibition against discrimination, *id.* § 1324b(g)(2)(B)(iv)(I). The perfect parallelism continues with second and third offenders as well ($2000 - $5000 for second offenders of each section, and $3000 - $10,000 for third offenders of

each section). *Compare id.* § 1324a(e)(4)(A) with *id.* § 1324b(g)(2)(B)(iv).

This precise balance does not appear in IRCA by coincidence. It exists because Congress, aware that Title VII does not prohibit discrimination on the basis of alienage, *see Espinoza v. Farah Mfg. Co.*, 414 U.S. 86, 95 (1973), was concerned that a regime that penalized the employment of unauthorized aliens, without *equally* penalizing discrimination against authorized aliens, would skew employer decision-making: employers, acting out of economic self-interest, would be tempted to minimize their risk of being subjected to IRCA's employer sanctions by rejecting foreign-seeming job applicants without troubling to determine whether each particular applicant was or was not authorized for work. *See* H.R. Rep. No. 99-682, pt. I, at 56 (1986).

The sanctions provisions of the "Legal Arizona Workers Act," Ariz. Rev. Stat. §§ 23-211 to 23-216, destroy that balance by, on the one hand, imposing what Arizona's then-Governor Janet Napolitano candidly called the "business death penalty" on employers who hire unauthorized aliens, *see* Pls./Appellant's Excerpts of Rec. ("ER") 287, No. 07-17272 (9th Cir. filed March 31, 2008), but, on the other hand, imposing no such death penalty-or indeed any penalty at all-on those who discriminate against authorized aliens. Then-Governor Napolitano acknowledged that this was a "defect" in the Arizona law, *id.* (criticizing the absence of any "provision protecting Arizona citizens or legal residents from discrimination"), but she signed it nevertheless, *id.*

On the Ninth Circuit's understanding of the scope of IRCA preemption, the painstaking balance that the IRCA Congress struck can easily be undone, not

only by Arizona, but by any state or municipality dissatisfied with IRCA. That is because the Ninth Circuit gave the most expansive reading possible to the seven-word parenthetical savings clause set out in IRCA's express preemption clause. That clause provides as follows:

> The provisions of this section [§1324a] preempt any State or local law imposing civil or criminal sanctions (other than through licensing and similar laws) upon those who employ, or recruit or refer for a fee for employment, unauthorized aliens.

8 U.S.C. § 1324a(h)(2). According to the Ninth Circuit, the parenthetical treats *any* form of permission by a state or local government to operate a business—including mere approval of a business' articles of incorporation—as a "licensing [or] similar law[]" and exempts such laws altogether from IRCA preemption.

2. In adopting an interpretation of IRCA that would make it so easy to upset IRCA's delicate balance among competing interests, the Ninth Circuit disregarded controlling precedents of this Court that address the precise problem posed in this case as to how to construe a statute that includes both an express preemption provision and a savings clause that exempts certain state laws from that express preemption provision.

Those precedents establish two principles: First, where a broad reading of such a savings clause would threaten to allow state regulation of a particular kind to thwart the purposes of the substantive provisions of the federal statute, the Court should, if possible, construe the savings clause narrowly so as to avoid that threat. *See Pilot Life Insurance Co. v. Dedeaux*,

481 U.S. 41, 54 (1987) (interpreting savings clause narrowly where "[t]he policy choices reflected in the . . . federal scheme would be completely undermined" if certain state-law remedies against insurance companies were deemed to fall within ERISA's savings clause for insurance regulation).

Second, where a narrowing construction of such a savings clause is unavailable and hence the state law at issue is saved from *express* preemption, the Court will nevertheless test the law in question under ordinary *implied* conflict preemption principles and invalidate the state law if it "stands as an obstacle to the accomplishment and execution of the full purposes and objectives" of the federal statute. *Geier v. Honda Motor Co.*, 529 U.S. 861, 873 (2000) (internal quotation marks omitted); *Freightliner Corp. v. Myrick*, 514 U.S. 280, 288 (1995).

a. As to the first principle, it is plain that the expansive reading of the savings clause adopted by the Ninth Circuit would threaten to undermine the deliberate policy choices made by the IRCA Congress. That is because every employer in the United States that operates through a corporate or other limited-liability form of organization requires some type of local governmental permission, such as approval of its articles of incorporation or charter, to do business. Indeed, even sole proprietors can be required to obtain a state or local license to engage in their trade. Hence, on the Ninth Circuit's view that any form of permission to operate a business constitutes a "license" within the meaning of the savings clause, any state or local government could do what Arizona has done and upend Congress' deliberate policy choice to calibrate the penalties for the hiring of unauthorized aliens with identical penalties against

discrimination on the basis of alienage. Such an interpretation would make a hash of Congress' careful work and thus violate the interpretive principles governing savings clauses set out in *Pilot Life*.

Moreover, the Ninth Circuit's interpretation would cause the savings clause parenthetical to render insignificant the express preemption provision of which it is part and hence run afoul of the broader interpretive principle that a statute ought to be construed, if possible, so that "no clause, sentence, or word shall be superfluous, void, or insignificant." *Duncan v. Walker*, 533 U.S. 167, 174 (2001) (internal quotation marks omitted). Because the only type of employers who would be subject to IRCA and who would not need some form of local government permission to do business would be non-business employers such as household employers of domestic labor—a type of employer employing only a minuscule fraction of the country's workforce—the Ninth Circuit's interpretation would leave the express preemption clause with no significant work to do. *See TRW Inc. v. Andrews*, 534 U.S. 19, 31 (2001) (rejecting interpretation that left a provision of a federal statute with work to do only in an insignificant subset of the possible cases).

Here, the historical backdrop against which the phrase "licensing and similar laws" was enacted suggests a reading of that phrase that does *not* threaten to undermine IRCA's careful balances or to render IRCA's express preemption clause insignificant. Well before IRCA was enacted in 1986, Congress had enacted a separate federal law, the Farm Labor Contractor Registration Act of 1963 ("FLCRA"), P.L. 88-582, 78 Stat. 920 (reprinted in 1964 U.S. Code Congressional & Admin. News (88th Cong. 2d Sess.) at

1048-1054), a statute that comprehensively licensed and regulated farm labor contractors both to ensure that the seasonal laborers being contracted out by such middlemen were not deceived, placed in unsafe housing or otherwise exploited, and to ensure that the consumers of such contract labor-individual farmers-were not victimized by sharp practices. *See* S. Rep. No. 88-202 (1963) (summary) (reprinted in 1964 U.S. Code Congressional & Admin. News (88th Cong. 2d Sess. at 3690). Among the provisions in FLCRA intended to protect farmer-consumers from such middlemen was one that prohibited contractors from hiring and referring unauthorized aliens. FLCRA § 5(b)(6). FLCRA expressly provided that it was not intended to preempt similar state laws regulating farm labor contractors. *Id.* § 12.

In 1983, Congress updated and superseded FLCRA with a similar licensing statute, the Migrant & Seasonal Agricultural Worker Protection Act ("MSAWPA"), P.L. 97-471, 29 U.S.C. §§ 1801 *et seq.* Like FLCRA, MSAWPA, as part of its broad scheme of regulating licensed contractors to protect laborers and farmers, prohibited licensees from hiring or referring unauthorized aliens, *see* MSAWPA § 106, 96 Stat. 2589-90; and, also like FLCRA, MSAWPA provided that it was not intended to preempt similar state laws regulating farm labor contractors, *id.* § 521, 96 Stat. 2599.

The legislative history of IRCA makes it plain that the type of licensing laws Congress contemplated would be saved from IRCA's express preemption provision were state laws analogous to those that had been saved from FLCRA and MSAWPA preemption, *i.e.*, state laws that, through licensing, comprehensively regulated the provision of seasonal labor or

temporary labor (albeit not necessarily only seasonal or temporary *farm* labor) by middlemen: "[T]he Committee does not intend to preempt licensing or 'fitness to do business laws,' such as state farm labor contractor laws or forestry laws, which specifically require such licensee or contractor to refrain from hiring, recruiting or referring undocumented aliens." H.R. Rep. No. 99-682, pt. I, at 58 (1986).

Thus the parenthetical in Section 1324a was meant only to extend, at most, to *bona fide* licensing laws (analogous to MSAWPA) that demonstrate, through their regulatory schemes, a genuine interest in regulating a broad range of employment-related business practices (rather than just immigration-related business practices), and that do not function merely as efforts to "improve" IRCA by toughening its sanctions on employers who hire unauthorized aliens.

The Arizona statute at issue here is not such a *bona fide* licensing law. It is, rather, a law whose sole purpose and effect is to prohibit the employment of unauthorized immigrants within the State of Arizona and hence to "correct" what Arizona's legislators believed were deficiencies in IRCA's sanctions regime. The fact that the law uses the loss of a business license as its primary sanction for violations does not make it a genuine licensing law within the meaning of the savings clause, particularly when the statutory term "licensing and similar laws" is considered, as it must be, in the context of the carefully balanced system of employer sanctions as a whole that Congress enacted through the IRCA. *See Pilot Life*, 481 U.S. at 51.

b. Even if, however, Section 1324a's parenthetical savings clause were read to be broad enough to encompass Arizona's statute, that would by no means

end the preemption inquiry. For this Court made it clear in *Geier* and *Freightliner* that even where a particular state regulation falls within the scope of a savings clause that constitutes an exception to an express preemption provision, the consequence is not that the regulation survives *all* preemption attacks, but only that it survives an attack predicated on *express* preemption. The challenger may still assert an *implied* preemption challenge, and the test as to whether the regulation is impliedly preempted because it stands as "an obstacle to the accomplishment and execution of the full purposes and objectives" of the federal enactment is no different than in cases involving statutes that *lack* an express preemption clause coupled with a savings clause. As this Court has put it, a preemption clause and a "savings clause" exception, read together, impose no "special burden" on the party arguing for implied preemption, but rather are "neutral" as to that question. *Geier*, 529 U.S. at 870-71.

That conclusion makes particular sense here where the savings clause is part of an express preemption clause that purports only to set forth the scope of preemption of one *section* of IRCA (the employer sanctions section, § 1324a) and does not purport to set forth the scope of preemption for IRCA as a whole (which encompasses as well the crucial anti-discrimination section, § 1324b). *Compare International Paper Co. v. Oullette*, 479 U.S. 481, 493 (1987) ("the plain language of the provisions on which respondents rely by no means compels the result they seek. Section 505(e) merely says that '[n]othing *in this section*,' *i.e.*, the citizen-suit provisions, shall affect an injured party's right to seek relief under state law; it does not purport to preclude pre-emption of state law by other provisions of the Act.").

The question whether the policy judgments reflected in IRCA's anti-discrimination section, when combined with those reflected in the employer sanctions section, add to the preemptive force of IRCA thus cannot, on a close textual analysis of the statute, be resolved by examination of §1324a(h)'s express preemption language in isolation. It can only be answered by applying traditional implied conflict preemption analysis. And, because for the reasons set forth *supra* at 6-8, as well as those set forth in the Petition at 24-25, the Arizona statute's sanctions provisions "stand[] as an obstacle to the accomplishment and execution of the full purposes and objectives" of IRCA, including its antidiscrimination purposes and objectives, the Ninth Circuit seriously erred in upholding those provisions against Petitioners' implied preemption challenge.[2]

---

[2] While *amici* NELP, SEIU, and LAS-ELC fully endorse the arguments stated in the Petition and in the brief of the Asian American Justice Center and its *amici* as to why the "E-Verify" provisions of the Arizona statute are federally preempted, we have confined our presentation to the points set forth in text to avoid burdening the Court with a duplicative submission.

CONCLUSION

For the foregoing reasons, NELP, SEIU, and LAS-ELC respectfully submit that the petition for writ of certiorari should be granted.

Respectfully submitted,

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August 27, 2009

JOINT APPENDIX

No. 09-115

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IN THE

Supreme Court of the United States

CHAMBER OF COMMERCE
OF THE UNITED STATES OF AMERICA *et al.*,
Petitioners,

v.

CRISS CANDELARIA *et al.*,
Respondents.

On Writ of Certiorari
to the United States Court of Appeals
for the Ninth Circuit

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NOTICE

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U.S. DISTRICT COURT
DISTRICT OF ARIZONA (PHOENIX DIVISION)

Civil Docket For Case # 2:07-cv-01355-NVW
Date Filed: 07/13/2007

ARIZONA CONTRACTORS ASSOCIATION, INC., et al.

v

NAPOLITANO, et al.

DOCKET ENTRIES

DATE	NO.	PROCEEDINGS
07/13/2007	1	COMPLAINT. Filing fee received: $ 350.00, receipt number 1338395, filed by Arizona Contractors Association, Inc. (Attachments: # 1)(Selden, David) (Entered: 07/13/2007)
07/13/2007	2	Corporate Disclosure Statement by Arizona Contractors Association, Inc. (Selden, David) (Entered: 07/13/2007)
07/13/2007		This case has been assigned to the Honorable Edward C. Voss. All future pleadings or documents should bear the correct case number: CV07-1355-PHX-ECV. (entered by ESL) (Entered: 07/16/2007)
07/13/2007	4	Magistrate Election Form Deadline (Attachments: # 1 Instructions)(ESL) (Entered: 07/16/2007)

DATE	NO.	PROCEEDINGS
07/16/2007	3	NOTICE TO FILER OF DEFICIENCY re 1 Complaint filed by Arizona Contractors Association, Inc. Description of deficiency: The following required documents were not attached: SUMMONS; Address, phone or email information was incorrectly added at the Party Information screen. FOLLOW UP REQUIRED. See attached for details. (ESL) (Entered: 07/16/2007)
07/16/2007	5	Notice re Summons to the Honorable Janet Napolitano by Arizona Contractors Association, Inc. re 1 Complaint (Selden, David) (Entered: 07/16/2007)
07/16/2007	6	Notice re Summons to Attorney General Terry Goddard by Arizona Contractors Association, Inc. re 1 Complaint (Selden, David) (Entered: 07/16/2007)
07/16/2007	7	Party Elects Assignment of Case to District Judge Jurisdiction. TEXT ONLY ENTRY, NO PDF DOCUMENT ATTACHED. (MAP) (Entered: 07/17/2007)
07/17/2007	8	MINUTE ORDER Pursuant to Local Rule 3.8(a), a request has been received for a random reassignment of this case to a District Judge FURTHER ORDERED Case reassigned by random draw to Judge Neil V. Wake. All further pleadings/papers should now list the following COMPLETE

DATE	NO.	PROCEEDINGS
		case number: CV 07-1355-PHX-NVW. (MAP) (Entered: 07/17/2007)
08/07/2007	9	Summons Issued as to Terry Goddard and Janet Napolitano. (Attachments: # 1 Janet Napolitano)(HLA)*** IMPORTANT: You must select "Document and stamps" or "Document and comments" on the print screen in order for the court seal to appear on the summons you print. (Entered: 08/07/2007)
08/08/2007	10	AMENDED COMPLAINT *First* against Terry Goddard, Janet Napolitano, filed by Arizona Contractors Association, Inc. (Selden, David) (Entered: 08/08/2007)
08/08/2007	11	Corporate Disclosure Statement by Arizona Contractors Association, Inc. (Selden, David) (Entered: 08/08/2007)
08/20/2007		Notice of request for e-notices by Faith Klepper. (Klepper, Faith) (Entered: 08/20/2007)
08/24/2007	12	NOTICE of Appearance by Mary Ruth O'Grady on behalf of all defendants (O'Grady, Mary) (Entered: 08/24/2007)
08/24/2007	13	NOTICE of Appearance by Christopher Arthur Munns on behalf of all defendants (Munns, Christopher) (Entered: 08/24/2007)
08/24/2007	14	MOTION to Amend/Correct re Amended Complaint and Proposed Order by

DATE	NO.	PROCEEDINGS
		Arizona Contractors Association, Inc., Arizona Employers for Immigration Reform Inc, Chamber of Commerce of the USA, Arizona Chamber of Commerce, Arizona Hispanic Chamber of Commerce Inc, Arizona Farm Bureau Federation, Arizona Restaurant and Hospitality Association, Associated Minority Contractors of America, Arizona Roofing Contractors Association, National Roofing Contractors Association, Wake Up Arizona Inc, Arizona Landscape Contractors Association Inc. (Attachments: # 1 # 2)(Selden, David) (Entered: 08/24/2007)
08/24/2007	15	LODGED Proposed Second Amended Complaint re: 14 MOTION to Amend/ Correct re Amended Complaint and Proposed Order. Document to be filed by Clerk if Motion to Leave to File or Amend is granted. Filed by Arizona Contractors Association, Inc., Arizona Employers for Immigration Reform Inc, Chamber of Commerce of the USA, Arizona Chamber of Commerce, Arizona Hispanic Chamber of Commerce Inc, Arizona Farm Bureau Federation, Arizona Restaurant and Hospitality Association, Associated Minority Contractors of America, Arizona Roofing Contractors Association, National Roofing Contractors Association, Wake Up Arizona Inc, Arizona

DATE	NO.	PROCEEDINGS
		Landscape Contractors Association Inc. (Selden, David) (Entered: 08/24/2007)
08/27/2007	16	STIPULATION *for Leave to File Second Amended Complaint* by Arizona Contractors Association, Inc., Arizona Employers for Immigration Reform Inc, Chamber of Commerce of the USA, Arizona Chamber of Commerce, Arizona Hispanic Chamber of Commerce Inc, Arizona Farm Bureau Federation, Arizona Restaurant and Hospitality Association, Associated Minority Contractors of America, Arizona Roofing Contractors Association, National Roofing Contractors Association, Wake Up Arizona Inc, Arizona Landscape Contractors Association Inc. (Attachments: # 1 # 2)(Selden, David) (Entered: 08/27/2007)
08/28/2007	17	ORDER granting 16 STIPULATION for Leave to File Second Amended Complaint (as attached to the Stipulation); finding as moot and vacated 14 MOTION to Amend Complaint; Defendants shall answer or otherwise respond to the Second Amended Complaint by 9/14/07. Signed by Judge Neil V Wake on 8/28/07. (REW,) (Entered: 08/28/2007)
08/28/2007	18	SECOND AMENDED COMPLAINT against Terry Goddard, Janet Napolitano, filed by Arizona Contractors Association, Inc., Arizona Employers for

DATE	NO.	PROCEEDINGS
		Immigration Reform Inc, Chamber of Commerce of the USA, Arizona Chamber of Commerce, Arizona Hispanic Chamber of Commerce Inc, Arizona Farm Bureau Federation, Arizona Restaurant and Hospitality Association, Associated Minority Contractors of America, Arizona Roofing Contractors Association, National Roofing Contractors Association, Wake Up Arizona Inc, Arizona Landscape Contractors Association Inc.(REW,) (Entered: 08/28/2007)
08/29/2007	19	Notice re of Filing Second Amended Complaint by Arizona Contractors Association, Inc., Arizona Employers for Immigration Reform Inc, Chamber of Commerce of the USA, Arizona Chamber of Commerce, Arizona Hispanic Chamber of Commerce Inc, Arizona Farm Bureau Federation, Arizona Restaurant and Hospitality Association, Associated Minority Contractors of America, Arizona Roofing Contractors Association, National Roofing Contractors Association, Wake Up Arizona Inc, Arizona Landscape Contractors Association Inc (Selden, David) (Entered: 08/29/2007)
08/29/2007	20	AMENDED COMPLAINT *(Second Amended Complaint)* against Terry Goddard, Janet Napolitano, filed by Arizona Contractors Association, Inc.,

DATE	NO.	PROCEEDINGS
		Arizona Employers for Immigration Reform Inc, Chamber of Commerce of the USA, Arizona Chamber of Commerce, Arizona Hispanic Chamber of Commerce Inc, Arizona Farm Bureau Federation, Arizona Restaurant and Hospitality Association, Associated Minority Contractors of America, Arizona Roofing Contractors Association, National Roofing Contractors Association, Wake Up Arizona Inc, Arizona Landscape Contractors Association Inc. (Selden, David) (Entered: 08/29/2007)
08/31/2007	21	MOTION for Admission Pro Hac Vice as to attorney Patrick Shen on behalf of Friend of the Court HR Initiative for a Legal Workforce. (BAS,) (Entered: 08/31/2007)
08/31/2007		PRO HAC VICE FEE PAID. $ 100, receipt number PHX061851 as to Patrick Shen. (BAS,) (Entered: 08/31/2007)
08/31/2007	22	ORDER pursuant to General Order 05-25 granting 21 Motion for Admission Pro Hac Vice. Per the Court's Administrative Policies and Procedures Manual, applicant has five (5) days in which to register as a user of the Electronic Filing System. Registration to be accomplished via the court's website at www.azd.uscourts.gov. (BAS,) (This is a TEXT ENTRY ONLY. There

DATE	NO.	PROCEEDINGS
		is no.pdf document associated with this entry.) (Entered: 08/31/2007)
08/31/2007	23	MOTION for Leave to File Excess Pages for Order by Arizona Contractors Association, Inc., Arizona Employers for Immigration Reform Inc, Chamber of Commerce of the USA, Arizona Chamber of Commerce, Arizona Hispanic Chamber of Commerce Inc, Arizona Farm Bureau Federation, Arizona Restaurant and Hospitality Association, Associated Minority Contractors of America, Arizona Roofing Contractors Association, National Roofing Contractors Association, Wake Up Arizona Inc, Arizona Landscape Contractors Association Inc. (Attachments: # 1)(Selden, David) (Entered: 08/31/2007)
08/31/2007	24	MOTION for Hearing on Motion *to Set Briefing Schedule or, in the Alternative, to Set Rule 16 Case Management Conference* by Arizona Contractors Association, Inc., Arizona Employers for Immigration Reform Inc, Chamber of Commerce of the USA, Arizona Chamber of Commerce, Arizona Hispanic Chamber of Commerce Inc, Arizona Farm Bureau Federation, Arizona Restaurant and Hospitality Association, Associated Minority Contractors of America, Arizona Roofing Contractors Association, National Roofing

DATE	NO.	PROCEEDINGS
		Contractors Association, Wake Up Arizona Inc, Arizona Landscape Contractors Association Inc. (Attachments: # 1)(Selden, David) (Entered: 08/31/2007)
08/31/2007	25	LODGED PROPOSED MOTION for Preliminary Injunction, re: 23 MOTION for Leave to File Excess Pages by Plaintiffs. Document to be filed by Clerk if Motion for Leave to File is granted. (Attachments: # 1)(Selden, David) Modified on 9/6/2007 THIS ENTRY HAS BEEN MODIFIED TO REFLECT THIS IS A "LODGED DOCUMENT" AND TO LINK TO MOTION FOR LEAVE (REW,). (Entered: 08/31/2007)
09/06/2007	26	ORDER setting scheduling conference re 25 MOTION for Preliminary Injunction on 9/14/2007 at 2:30 PM in Courtroom 504, 401 West Washington Street, Phoenix, AZ 85003 before Judge Neil V. Wake. Signed by Judge Neil V. Wake on 9/6/2007. (NVW,) (Entered: 09/06/2007)
09/06/2007	27	NOTICE TO FILER OF DEFICIENCY re 25 LODGED Motion for Preliminary Injunction filed by all Plaintiffs. Description of deficiency: Leave of Court required to file document. DO NOT RE-FILE; open document for details. (REW,) (Entered: 09/06/2007)

DATE	NO.	PROCEEDINGS
09/07/2007	28	MOTION to Consolidate Cases *and Transfer* by Terry Goddard, Janet Napolitano. (Attachments: # 1) (O'Grady, Mary) (Entered: 09/07/2007)
09/10/2007	29	ORDER re 28 MOTION to Consolidate Cases *and Transfer. Hearing set for 9/14/2007 at 2:30 PM before Judge Neil V. Wake. Signed by Judge Neil V. Wake on 9/10/2007. (NVW,) (Entered: 09/10/2007)*
09/10/2007	30	ORDER denying 23 Motion for Leave to File Excess Pages. Signed by Judge Neil V. Wake on 9/10/2007.(NVW,) (Entered: 09/10/2007)
09/10/2007	31	MOTION to Dismiss Case by Terry Goddard, Janet Napolitano. (Munns, Christopher) (Entered: 09/10/2007)
09/11/2007	32	MOTION for Preliminary Injunction by Arizona Contractors Association, Inc., Arizona Employers for Immigration Reform Inc, Chamber of Commerce of the USA, Arizona Chamber of Commerce, Arizona Hispanic Chamber of Commerce Inc, Arizona Farm Bureau Federation, Arizona Restaurant and Hospitality Association, Associated Minority Contractors of America, Arizona Roofing Contractors Association, National Roofing Contractors Association, Wake Up Arizona Inc, Arizona Landscape Contractors Association Inc. (Attach-

DATE	NO.	PROCEEDINGS
		ments: # 1)(Selden, David) (Entered: 09/11/2007)
09/13/2007	33	REPORT of Joint Report to the Court Regarding Scheduling and Briefing Matters by Defendants Terry Goddard, Janet Napolitano, Plaintiffs Arizona Contractors Association, Inc., Arizona Employers for Immigration Reform Inc, Chamber of Commerce of the USA, Arizona Chamber of Commerce, Arizona Hispanic Chamber of Commerce Inc, Arizona Farm Bureau Federation, Arizona Restaurant and Hospitality Association, Associated Minority Contractors of America, Arizona Roofing Contractors Association, National Roofing Contractors Association, Wake Up Arizona Inc, Arizona Landscape Contractors Association Inc. (Pace, Julie) (Entered: 09/13/2007)
09/14/2007	34	BRIEF *Brief of Amicus Curiae*. (Shen, Patrick) (Entered: 09/14/2007)
09/14/2007	35	MOTION for Leave to File Brief of Amicus Curiae by HR Initiative for a Legal Workforce, Amicus Curiae. (Shen, Patrick) (Entered: 09/14/2007)
09/14/2007	36	Minute Entry. Proceedings held before Judge Neil V Wake : Scheduling Conference, re: preliminary injunction AND Motion Hearing, re: 28 motion to consolidate held on 9/14/2007. The Motion to Consolidate Cases and

DATE	NO.	PROCEEDINGS
		Transfer 28 is GRANTED and CV07-1684-PHX-MHB is consolidated into CV07-1355-PHX-NVW and transferred to this division, but Answers in each case are to be filed separately. The Motion for Leave to File Brief of Amicus Curiae 35 is GRANTED. The briefing schedule is set as outlined in this minute entry. Motions to Dismiss are to be filed and/or supplemented by 9/26/07. (Court Reporter Laurie Adams.)(REW,) (Entered: 09/17/2007)
09/17/2007		Notice of request for e-notices by Jonathan Weissglass. (Weissglass, Jonathan) (Entered: 09/17/2007)
09/25/2007	37	BRIEF *(Supplemental) Regarding Issues Not Raised in Motion for Preliminary Injunction* by Plaintiffs Arizona Contractors Association, Inc., Arizona Employers for Immigration Reform Inc, Chamber of Commerce of the USA, Arizona Chamber of Commerce, Arizona Hispanic Chamber of Commerce Inc, Arizona Farm Bureau Federation, Arizona Restaurant and Hospitality Association, Associated Minority Contractors of America, Arizona Roofing Contractors Association, National Roofing Contractors Association, Wake Up Arizona Inc, Arizona Landscape Contractors Association Inc. (Selden, David) (Entered: 09/25/2007)

DATE	NO.	PROCEEDINGS
09/26/2007	38	MOTION to Dismiss Complaint and Memorandum of Points and Authorities in Support Thereof by Terry Goddard, Janet Napolitano (re-filed in lead case per order of 9/28/07) (REW,) (Entered: 09/28/2007)
09/28/2007	39	ORDER that all future pleadings in these consolidated matters be filed only in the lead cause number, CV 07-01355 PHX NVW; the Clerk shall file Defendants' Motion to Dismiss Chicanos Por La Causa and Somos America (doc. #28 in CV07-01684) in the lead case and terminate the motion pending in the member case. Signed by Judge Neil V Wake on 9/27/07. (REW,) (Entered: 09/28/2007)
10/03/2007	40	RESPONSE in Opposition re 31 MOTION to Dismiss Case filed by Arizona Contractors Association, Inc., Arizona Employers for Immigration Reform Inc, Chamber of Commerce of the USA, Arizona Chamber of Commerce, Arizona Hispanic Chamber of Commerce Inc, Arizona Farm Bureau Federation, Arizona Restaurant and Hospitality Association, Associated Minority Contractors of America, Arizona Roofing Contractors Association, National Roofing Contractors Association, Wake Up Arizona Inc, Arizona Landscape Contractors Association Inc. (Selden, David) (Entered: 10/03/2007)

DATE	NO.	PROCEEDINGS
10/03/2007	41	DECLARATION of Declaration of David A. Selden re 40 Response in Opposition to Motion, by Plaintiffs Arizona Contractors Association, Inc., Arizona Employers for Immigration Reform Inc, Chamber of Commerce of the USA, Arizona Hispanic Chamber of Commerce Inc, Arizona Farm Bureau Federation, Arizona Restaurant and Hospitality Association, Associated Minority Contractors of America, Arizona Roofing Contractors Association, National Roofing Contractors Association, Wake Up Arizona Inc, Arizona Landscape Contractors Association Inc. (Selden, David) (Entered: 10/03/2007)
10/04/2007	45	MOTION for Admission Pro Hac Vice as to attorney Christina B LaBrie on behalf of Amicus Curiae. (BAS,) (Entered: 10/05/2007)
10/05/2007	42	MOTION to File Amicus Curiae *in Support of Plaintiffs* by National Federation of Independent Legal Foundation. (Tucek, Gregg) (Entered: 10/05/2007)
10/05/2007	43	MOTION to File Amicus Curiae *in Support of Plaintiffs* by National Federation of Independent Legal Foundation. (Tucek, Gregg) Modified on 10/9/2007 ENTRY IS DUPLICATE OF #42 (REW,). (Entered: 10/05/2007)

DATE	NO.	PROCEEDINGS
10/05/2007	44	LODGED PROPOSED BRIEF, re: 42 MOTION to File Amicus Curiae *in Support of Plaintiffs* by National Federation of Independent Legal Foundation. (Tucek, Gregg) Modified on 10/9/2007 INCORRECT DOCUMENT TYPE SELECTED; ATTORNEY NOTICED TO RE-FILE USING THE LODGED PROPOSED DOCUMENT EVENT. (REW,). (Entered: 10/05/2007)
10/05/2007		PRO HAC VICE FEE PAID. $ 100, receipt number PHX063010 as to Christina B LaBrie. (BAS,) (Entered: 10/05/2007)
10/05/2007	46	ORDER pursuant to General Order 05-25 granting 45 Motion for Admission Pro Hac Vice. Per the Court's Administrative Policies and Procedures Manual, applicant has five (5) days in which to register as a user of the Electronic Filing System. Registration to be accomplished via the court's website at www.azd.uscourts.gov. (BAS,) (This is a TEXT ENTRY ONLY. There is no.pdf document associated with this entry.) (Entered: 10/05/2007)
10/09/2007	47	NOTICE TO FILER OF DEFICIENCY re 43 MOTION to File Amicus Curiae filed by National Federation of Independent Legal Foundation, 44 MOTION to File Amicus Curiae filed by National Federation of Indepen-

DATE	NO.	PROCEEDINGS
		dent Lægal Foundation. Description of deficiency: Document (Motion) filed twice, as 42 and 43; Proposed Lodged Brief (#44) not electronically lodged using the Proposed Lodged Document event. (REW,) (Entered: 10/09/2007)
10/09/2007	48	RESPONSE in Opposition re 38 MOTION to Dismiss Case filed by Chicanos Por La Causa, Inc., Somos America. (Weissglass, Jonathan) (Entered: 10/09/2007)
10/09/2007	49	DECLARATION of Edmundo Hidalgo (Supplemental) re 48 Response in Opposition to Motion by Plaintiffs Chicanos Por La Causa, Inc., Somos America filed by Chicanos Por La Causa, Inc., Somos America. (Weissglass, Jonathan) (Entered: 10/09/2007)
10/09/2007	50	MOTION for Admission Pro Hac Vice as to attorney Louis R. Moffa, Jr. *of Ballard Spahr Andrews & Ingersoll LLP* by Arizona Contractors Association, Inc., Arizona Employers for Immigration Reform Inc, Chamber of Commerce of the USA, Arizona Chamber of Commerce, Arizona Hispanic Chamber of Commerce Inc, Arizona Farm Bureau Federation, Arizona Restaurant and Hospitality Association, Associated Minority Contractors of America, Arizona Roofing Contractors Association, National Roofing Contractors Association, Wake Up

DATE	NO.	PROCEEDINGS
		Arizona Inc, Arizona Landscape Contractors Association Inc. (Selden, David) (Entered: 10/09/2007)
10/10/2007	51	NOTICE TO FILER OF DEFICIENCY re 50 MOTION for Admission Pro Hac Vice as to attorney Louis R. Moffa Jr. Description of deficiency: Document must be filed in paper form. Attorney not eligible to file electronically. (REW,) (Entered: 10/10/2007)
10/10/2007	52	MOTION for Leave to File *Amicus Curiae Brief in Support of Plaintiffs* by National Federation of Independent Legal Foundation. (Tucek, Gregg) (Entered: 10/10/2007)
10/10/2007	53	LODGED Proposed Brief of Amicus Curiae. Document to be filed by Clerk if Motion to Leave to File or Amend is granted. Filed by National Federation of Independent Legal Foundation. (Tucek, Gregg) (Entered: 10/10/2007)
10/10/2007	54	MOTION for Leave to File Excess Pages for Defendants' Motion to Establish Page Limit for Response by Terry Goddard, Gale Garriott, Janet Napolitano. (Attachments: # 1) (O'Grady, Mary) (Entered: 10/10/2007)
10/10/2007	55	MOTION for Admission Pro Hac Vice as to attorney Louis R Moffa Jr on behalf of the plaintiffs. (BAS,) (Entered: 10/11/2007)

DATE	NO.	PROCEEDINGS
10/11/2007		PRO HAC VICE FEE PAID. $ 100, receipt number PHX063218 as to Louis Craig Moffa, Jr. (BAS,) (Entered: 10/11/2007)
10/11/2007	56	ORDER pursuant to General Order 05-25 granting 55 Motion for Admission Pro Hac Vice. Per the Court's Administrative Policies and Procedures Manual, applicant has five (5) days in which to register as a user of the Electronic Filing System. Registration to be accomplished via the court's web site at www.azd.uscourts.gov. (BAS,) (This is a TEXT ENTRY ONLY. There is no.pdf document associated with this entry.) (Entered: 10/11/2007)
10/11/2007	57	TRANSCRIPT of Motion Hearing - Scheduling Conference re: Preliminary Injunction held on 9/14/2007 before Judge Neil V Wake. Court Reporter: Lauire A Adams. (BAS,) (Entered: 10/12/2007)
10/12/2007	58	RESPONSE to Motion re 32 MOTION for Preliminary Injunction filed by Janet Napolitano. (Attachments: # 1 Exhibit)(O'Grady, Mary) (Entered: 10/12/2007)
10/16/2007	59	REPLY in Support re 38 MOTION to Dismiss Case filed by Terry Goddard, Gale Garriott, Janet Napolitano. (Munns, Christopher) (Entered: 10/16/2007)

DATE	NO.	PROCEEDINGS
10/16/2007	60	REPLY in Support re 38, 31 MOTION to Dismiss Case of *Arizona Contractors* filed by Terry Goddard, Gale Garriott, Janet Napolitano. (Munns, Christopher) Modified on 10/17/2007 TO ADD LINK TO MOTION #31 (REW,). (Entered: 10/16/2007)
10/18/2007	61	ORDER granting Dfts' 54 Motion - Dfts' response to Plas' preliminary injunction motions and supplemental briefing may not exceed 45 pages. Signed by Judge Neil V Wake on 10/18/07.(KMG) (Entered: 10/18/2007)
10/18/2007	62	ORDER that the National Federation of Independent Business Legal Foundation's Motion for Leave to File Amicus Curiae Brief in Support of Plas 52 is granted, and the proposed Brief of Amicus Curiae 53 is filed. Signed by Judge Neil V Wake on 10/18/07. (KMG) (Entered: 10/18/2007)
10/18/2007	63	BRIEF OF AMICUS CURIAE by Amicus National Federation of Independent Business Legal Foundation. (KMG) (Entered: 10/18/2007)
10/19/2007	64	REPLY in Support re 32 MOTION for Preliminary Injunction *and Final Decision on the Merits* filed by Chicanos Por La Causa, Inc., Somos America. (Weissglass, Jonathan) (Entered: 10/19/2007)

DATE	NO.	PROCEEDINGS
10/19/2007	65	MOTION for Leave to File Excess Pages for Motion for Leave to Exceed Page Limit on Business Group Plaintiffs' Reply in Support of Motion for Preliminary Injunction/Motion for Judgment on the Merits by Arizona Contractors Association, Inc., Arizona Employers for Immigration Reform Inc, Chamber of Commerce of the USA, Arizona Chamber of Commerce, Arizona Hispanic Chamber of Commerce Inc, Arizona Farm Bureau Federation, Arizona Restaurant and Hospitality Association, Associated Minority Contractors of America, Arizona Roofing Contractors Association, National Roofing Contractors Association, Wake Up Arizona Inc, Arizona Landscape Contractors Association Inc. (Selden, David) (Entered: 10/19/2007)
10/19/2007	66	LODGED Proposed Business Group Plaintiffs' Reply in Support of Motion for Preliminary Injunction/Motion for Judgment on the Merits re: 65 MOTION for Leave to File Excess Pages for Motion for Leave to Exceed Page Limit on Business Group Plaintiffs' Reply in Support of Motion for Preliminary Injunction/Motion for Judgment on the Merits. Document to be filed by Clerk if Motion to Leave to File or Amend is granted. Filed by Arizona Contractors Association, Inc., Arizona

DATE	NO.	PROCEEDINGS
		Employers for Immigration Reform Inc, Chamber of Commerce of the USA, Arizona Chamber of Commerce, Arizona Hispanic Chamber of Commerce Inc, Arizona Farm Bureau Federation, Arizona Restaurant and Hospitality Association, Associated Minority Contractors of America, Arizona Roofing Contractors Association, National Roofing Contractors Association, Wake Up Arizona Inc, Arizona Landscape Contractors Association Inc. (Selden, David) (Entered: 10/19/2007)
10/19/2007	68	REPLY in Support re 32 MOTION for Preliminary Injunction/Motion for Judgment on the Merits filed by Arizona Contractors Association, Inc., Arizona Employers for Immigration Reform Inc, Chamber of Commerce of the USA, Arizona Chamber of Commerce, Arizona Hispanic Chamber of Commerce Inc, Arizona Farm Bureau Federation, Arizona Restaurant and Hospitality Association, Associated Minority Contractors of America, Arizona Roofing Contractors Association, Wake Up Arizona Inc, Arizona Landscape Contractors Association Inc. (REW,) (Entered: 10/22/2007)
10/22/2007	67	ORDER granting Business Group Plaintiffs' 65 Motion for Leave to File Excess Pages; Business Group Plain

DATE	NO.	PROCEEDINGS
		tiffs' Reply in Support of Motion for Preliminary Injunction/Motion for Judgment on the Merits submitted to the Court on 10/19/07 66 , is deemed filed as of that date. Signed by Judge Neil V Wake on 10/22/07.(REW,) (Entered: 10/22/2007)
10/23/2007	69	ORDER; the court has reserved November 13, 14, and 15, 2007, as possible times for hearing of all pending matters in this case; parties' joint or separate suggestions due by 4:00 p.m., 10/26/07, as to how much time will be necessary for hearing and which day or days are preferable to the parties. Signed by Judge Neil V Wake on 10/23/07. (REW,) (Entered: 10/23/2007)
10/24/2007	70	STIPULATION *Joint Stipulation Regarding Hearing* by Chicanos Por La Causa, Inc., Somos America, Arizona Contractors Association, Inc., Arizona Employers for Immigration Reform Inc, Chamber of Commerce of the USA, Arizona Chamber of Commerce, Arizona Hispanic Chamber of Commerce Inc, Arizona Farm Bureau Federation, Arizona Restaurant and Hospitality Association, Associated Minority Contractors of America, Arizona Roofing Contractors Association, National Roofing Contractors Association, Wake Up Arizona Inc, Arizona

DATE	NO.	PROCEEDINGS
		Landscape Contractors Association Inc. (Selden, David) (Entered: 10/24/2007)
10/25/2007	71	ORDER, Hearing as to all pending motions: 31, 32, 38 in the lead case and #5 in the member case and TRIAL set for 11/14/2007 10:30 AM before Judge Neil V Wake. Signed by Judge Neil V Wake on 10/25/07. (REW,) (Entered: 10/25/2007)
11/02/2007	72	STATEMENT of Joint Stipulated Statement of Facts by Plaintiffs Arizona Contractors Association, Inc., Arizona Employers for Immigration Reform Inc; Chamber of Commerce of the USA, Arizona Chamber of Commerce, Arizona Hispanic Chamber of Commerce Inc, Arizona Farm Bureau Federation, Arizona Restaurant and Hospitality Association, Associated Minority Contractors of America, Arizona Roofing Contractors Association, National Roofing Contractors Association, Wake Up Arizona Inc, Arizona Landscape Contractors Association Inc. (Attachments: # 1 Exhibit Exhibits 1-7# 2 Exhibit Exhibit 8 (part 1) # 3 Exhibit Exhibit 8 (part 2)# 4 Exhibit Exhibit 9-10# 5 Exhibit Exhibit 10 (cont.)# 6 Exhibit Exhibits 11-12# 7 Exhibit Exhibit 13# 8 Exhibit Exhibit 14# 9 Exhibit Exhibits 15-17# 10 Exhibit Exhibits 18-21# 11 Exhibit Exhibit 22# 12 Exhibit Exhibit 22 (cont.

DATE	NO.	PROCEEDINGS
		1)# 13 Exhibit Exhibit 22 (cont. 2)# 14 Exhibit Exhibit 22 (cont. 3)# 15 Exhibit Exhibit 23)(Selden, David) (Entered: 11/02/2007)
11/05/2007	73	ORDER that Pla Arizona Contractors Association et al. and Dfts submit further briefing by 12:00 p.m. on 11/13/07 and prepare to discuss at oral argument on 11/14/07 the following questions listed in this order. (Open attached pdf for full details). Signed by Judge Neil V Wake on 11/05/07. (ESL) (Entered: 11/05/2007)
11/06/2007	74	Exhibit *A-N for Motion for Preliminary Injunction (to be attached to doc. 32)* by Arizona Contractors Association, Inc., Arizona Employers for Immigration Reform Inc, Chamber of Commerce of the USA, Arizona Chamber of Commerce, Arizona Hispanic Chamber of Commerce Inc, Arizona Farm Bureau Federation, Arizona Restaurant and Hospitality Association, Associated Minority Contractors of America, Arizona Roofing Contractors Association, National Roofing Contractors Association, Wake Up Arizona Inc, Arizona Landscape Contractors Association Inc. (Attachments: # 1 Exhibit Exhibit F-I - Motion for Preliminary Injunction (Doc. #32)# 2 Exhibit Exhibit J - Motion for Preliminary Injunction (Doc. 32)# 3

DATE	NO.	PROCEEDINGS
		Exhibit Exhibit J (cont.) - Motion for Preliminary Injunction (doc. 32)# 4 Exhibit Exhibit K-L - Motion for Preliminary Injunction (doc 32)# 5) (Selden, David) Modified on 11/9/2007 INCORRECT DOCUMENT TYPE SELECTED; LINKAGE ADDED (REW,). (Entered: 11/06/2007)
11/08/2007	75	Notice re Defendants' Notice of Filing Supplemental Authority by Terry Goddard, Gale Garriott, Janet Napolitano (Munns, Christopher) (Entered: 11/08/2007)
11/13/2007	76	SUPPLEMENT of Plaintiffs' Supplemental Brief Requested by the Court by Plaintiffs Arizona Contractors Association, Inc., Arizona Employers for Immigration Reform Inc, Chamber of Commerce of the USA, Arizona Chamber of Commerce, Arizona Hispanic Chamber of Commerce Inc, Arizona Farm Bureau Federation, Arizona Restaurant and Hospitality Association, Associated Minority Contractors of America, Arizona Roofing Contractors Association, National Roofing Contractors Association, Wake Up Arizona Inc, Arizona Landscape Contractors Association Inc. (Attachments: # 1 Exhibit Exh. A to Supplemental Brief# 2 Exhibit Exh. A (cont.-1) to Supplemental Brief# 3 Exhibit Exh. A (cont.-2)# 4 Exhibit Exh. B# 5

DATE	NO.	PROCEEDINGS
		Exhibit Exh. B (cont.-1)# 6 Exhibit Exh. B (cont.-2)# 7 Exhibit Exh. C) (Selden, David) (Entered: 11/13/2007)
11/13/2007	77	BRIEF *DEFENDANTS SUPPLEMENTAL BRIEF REGARDING FOURTH AMENDMENT ISSUES* by Defendants Terry Goddard, Gale Garriott, Janet Napolitano. (O'Grady, Mary) (Entered: 11/13/2007)
11/13/2007	78	RESPONSE re 75 Other Notice *of Supplemental Authority by Defendants* by Plaintiffs Arizona Contractors Association, Inc., Arizona Employers for Immigration Reform Inc, Chamber of Commerce of the USA, Arizona Chamber of Commerce, Arizona Hispanic Chamber of Commerce Inc, Arizona Farm Bureau Federation, Arizona Restaurant and Hospitality Association, Associated Minority Contractors of America, Arizona Roofing Contractors Association, National Roofing Contractors Association, Wake Up Arizona Inc, Arizona Landscape Contractors Association Inc. (Selden, David) (Entered: 11/13/2007)
11/13/2007	79	ORDER that the location for hearing on motions and trial scheduled November 14, 2007, at 10:30 a.m. in this matter is changed to the Special Proceedings Courtroom, Courtroom #200, 401 West Washington Street, Phoenix, Arizona, before the Honorable Neil V.

DATE	NO.	PROCEEDINGS
		Wake. Signed by Judge Neil V Wake on 11/13/07. (REW,) (Entered: 11/13/2007)
11/14/2007	80	Minute Entry. Proceedings held before Judge Neil V Wake: Bench Trial held and completed on 11/14/2007 and Motion Hearing held re 38 MOTION to Dismiss Case filed by Terry Goddard and Janet Napolitano, 32 MOTION for Preliminary Injunction filed by Wake Up Arizona Inc, Arizona Roofing Contractors Association, Chamber of Commerce of the USA, Arizona Chamber of Commerce, Arizona Employers for Immigration Reform Inc, Arizona Landscape Contractors Association Inc, Arizona Hispanic Chamber of Commerce Inc, National Roofing Contractors Association, Associated Minority Contractors of America, Arizona Contractors Association, Inc., Arizona Farm Bureau Federation, and Arizona Restaurant and Hospitality Association, and 31 MOTION to Dismiss Case filed by Janet Napolitano and Terry Goddard. The Court takes the trial and the motions under advisement. (Court Reporter Laurie Adams.)(SJF) (Entered: 11/14/2007)
11/16/2007	81	TRANSCRIPT DESIGNATION AND ORDER FORM by Arizona Contractors Association, Inc., Arizona Em-

DATE	NO.	PROCEEDINGS
		ployers for Immigration Reform Inc, Chamber of Commerce of the USA, Arizona Chamber of Commerce, Arizona Hispanic Chamber of Commerce Inc, Arizona Farm Bureau Federation, Arizona Restaurant and Hospitality Association, Associated Minority Contractors of America, Arizona Roofing Contractors Association, National Roofing Contractors Association, Wake Up Arizona Inc, Arizona Landscape Contractors Association Inc for proceedings held on 11/14/07 before Judge Wake. (Selden, David) (Entered: 11/16/2007)
11/26/2007	82	TRANSCRIPT of Motion Hearing and Bench Trial Proceedings held on 11/14/07 before Judge Neil V Wake. Court Reporter: Laurie A Adams. (BAS,) (Entered: 11/26/2007)
11/27/2007	83	TRANSCRIPT DESIGNATION AND ORDER FORM by Chicanos Por La Causa, Inc. for proceedings held on 11/14/07 before Judge Neil V Wake. (BAS,) (Entered: 11/28/2007)
12/04/2007		Notice of request for e-notices by Barry H. Uhrman. (Uhrman, Barry) (Entered: 12/04/2007)
12/07/2007	84	VACATED BY ORDER #86 (ENTERED 12/10/07) AND REPLACED BY DOCUMENT #87 – FINDINGS OF FACT AND CONCLUSIONS OF

DATE	NO.	PROCEEDINGS
		LAW - IT IS THEREFORE ORDERED that the Clerk enter judgment dismissing this action without prejudice for lack of subject matter jurisdiction, there being no justiciable case or controversy against the Defendants. Signed by Judge Neil V Wake on 12/7/07. (SAT) Modified on 12/17/2007 (REW,). (Entered: 12/07/2007)
12/07/2007	85	JUDGMENT IN A CIVIL CASE - IT IS ORDERED AND ADJUDGED that pursuant to the Court's order dated December 7, 2007, judgment is entered against plaintiffs. Plaintiffs to take nothing, and complaint and action are dismissed without prejudice for lack of subject matter jurisdiction, there being no justiciable case or controversy against the Defendants. (SAT) (Entered: 12/07/2007)
12/10/2007	86	ORDER - IT IS ORDERED that the 84 FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER filed December 7, 2007, is vacated and replaced by the Findings of Fact, Conclusions of Law, and Order (Corrected) filed this day. Signed by Judge Neil V Wake on 12/10/07. (SAT) (Entered: 12/10/2007)
12/10/2007	87	FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER (Corrected) - IT IS THEREFORE OR-

DATE	NO.	PROCEEDINGS
		DERED that the Clerk enter judgment dismissing this action without prejudice for lack of subject matter jurisdiction, there being no justiciable case or controversy against the Defendants. Signed by Judge Neil V Wake on 12/7/07. (SAT) (Entered: 12/10/2007)
12/12/2007	88	TRANSCRIPT DESIGNATION AND ORDER FORM by Terry Goddard, Gale Garriott, Janet Napolitano for proceedings held on 9/14/2007 before Judge Wake. (O'Grady, Mary) (Entered: 12/12/2007)
12/12/2007	89	TRANSCRIPT DESIGNATION AND ORDER FORM by Terry Goddard, Gale Garriott, Janet Napolitano for proceedings held on 11/14/2007 before Judge Wake. (O'Grady, Mary) (Entered: 12/12/2007)
12/13/2007	90	NOTICE OF APPEAL to 9th Circuit, as to 87 Findings of Fact & Conclusions of Law, 84 Findings of Fact & Conclusions of Law, 85 Clerk's Judgment, by Chicanos Por La Causa Inc, Somos America. Filing fee received: $455.00, receipt number 0970000000001609865. (Weissglass, Jonathan) Modified on 12/17/2007 TO ADD ADDITIONAL FILER TO TEXT (REW,). (Entered: 12/13/2007)

DATE	NO.	PROCEEDINGS
12/13/2007	91	MOTION to Stay re CPLC Plaintiffs' Motion for Injunction Pending Appeal by Chicanos Por La Causa, Inc. (Weissglass, Jonathan) (Entered: 12/13/2007)
12/13/2007	92	NOTICE OF APPEAL to 9th Circuit, 87 (Corrected) Findings of Fact & Conclusions of Law, 85 Judgment, 84 Findings of Fact & Conclusions of Law by Arizona Contractors Association, Inc., Arizona Employers for Immigration Reform Inc, Chamber of Commerce of the USA, Arizona Chamber of Commerce, Arizona Hispanic Chamber of Commerce Inc, Arizona Farm Bureau Federation, Arizona Restaurant and Hospitality Association, Associated Minority Contractors of America, Arizona Roofing Contractors Association, National Roofing Contractors Association, Wake Up Arizona Inc, Arizona Landscape Contractors Association Inc. Filing fee received: $ 455.00, receipt number 0970000000001609980. (Selden, David) Modified on 12/17/2007 TO REFLECT CORRECT FILERS AND TO ADD LINKAGE (REW,). (Entered: 12/13/2007)
12/13/2007	93	MOTION for Leave to File Excess Pages by Arizona Contractors Association, Inc., Arizona Employers for Immigration Reform Inc, Chamber of

DATE	NO.	PROCEEDINGS
		Commerce of the USA, Arizona Chamber of Commerce, Arizona Hispanic Chamber of Commerce Inc, Arizona Farm Bureau Federation, Arizona Restaurant and Hospitality Association, Associated Minority Contractors of America, Arizona Roofing Contractors Association, National Roofing Contractors Association, Wake Up Arizona Inc, Arizona Landscape Contractors Association Inc. (Selden, David) (Entered: 12/13/2007)
12/13/2007	94	MOTION for Injunction Pending Appeal filed by Arizona Contractors Association, Inc., Arizona Employers for Immigration Reform Inc, Chamber of Commerce of the USA, Arizona Chamber of Commerce, Arizona Hispanic Chamber of Commerce Inc, Arizona Farm Bureau Federation, Arizona Restaurant and Hospitality Association, Associated Minority Contractors of America, Arizona Roofing Contractors Association, National Roofing Contractors Association, Wake Up Arizona Inc, Arizona Landscape Contractors Association Inc. (Selden, David) Modified on 12/14/2007 (SAT). THIS ENTRY HAS BEEN MODIFIED FROM "LODGED PROPOSED DOCUMENT" TO "MOTION" AND FILE DATE MODIFIED FROM 12/13/07 TO 12/14/07 TO CORRECT

DATE	NO.	PROCEEDINGS
		FILE DATE PER ORDER #96. (Entered: 12/13/2007)
12/13/2007	95	MOTION to Expedite Motion for Injunction Pending Appeal by Arizona Contractors Association, Inc., Arizona Employers for Immigration Reform Inc, Chamber of Commerce of the USA, Arizona Chamber of Commerce, Arizona Hispanic Chamber of Commerce Inc, Arizona Farm Bureau Federation, Arizona Restaurant and Hospitality Association, Associated Minority Contractors of America, Arizona Roofing Contractors Association, National Roofing Contractors Association, Wake Up Arizona Inc, Arizona Landscape Contractors Association Inc. (Selden, David) Modified on 1/16/2008 THIS ENTRY HAS BEEN MODIFIED TO REFLECT CORRECT DOCUMENT DESCRIPTION (REW,). (Entered: 12/13/2007)
12/14/2007	96	ORDER - IT IS ORDERED that Plaintiffs' 93 Motion for Leave to Exceed Page Limit is granted, and their lodged Motion for Injunction Pending Appeal (doc. # 94) is ordered filed and deemed served this day. IT IS FURTHER ORDERED setting hearing on the Motions for Injunction Pending Appeal (docs. # 91 and 94) on December 18, 2007, at 1:30 p.m. in the Special Proceedings Courtroom, #200.

DATE	NO.	PROCEEDINGS
		Signed by Judge Neil V Wake on 12/14/07. (SAT) (Entered: 12/14/2007)
12/17/2007	97	ORDER; the parties file by 12:00 p.m. on 12/18/07, supplemental briefs concerning cases where a court has dismissed an action, before or after trial, for lack of subject matter jurisdiction, and where a motion for injunction pending appeal was presented that would look beyond the denial of subject matter jurisdiction and grant substantive relief. See order for complete specific details. Signed by Judge Neil V Wake on 12/17/07. (REW,) (Entered: 12/17/2007)
12/17/2007	98	Notice of Appeal Notification Form; Notice of Appeal and copy of docket sheet transmitted to Ninth Circuit and all parties re 90 Notice of Appeal (REW,) (Entered: 12/17/2007)
12/17/2007		CADS Sent re 90 Notice of Appeal, Civil Appeals Docketing Statement sent to 9th Circuit on this date. (REW,) (Entered: 12/17/2007)
12/17/2007	99	Notice of Appeal Notification Form; Notice of Appeal and copy of docket sheet transmitted to Ninth Circuit and all parties re 92 Notice of Appeal (REW,) (Entered: 12/17/2007)
12/17/2007	100	TRANSCRIPT DESIGNATION AND ORDER FORM by Arizona Contractors Association, Inc., Arizona Em-

DATE	NO.	PROCEEDINGS
		ployers for Immigration Reform Inc, Chamber of Commerce of the USA, Arizona Chamber of Commerce, Arizona Hispanic Chamber of Commerce Inc, Arizona Farm Bureau Federation, Arizona Restaurant and Hospitality Association, Associated Minority Contractors of America, Arizona Roofing Contractors Association, National Roofing Contractors Association, Arizona Landscape Contractors Association Inc for proceedings held on 09/14/07 before Judge Wake. (Selden, David) (Entered: 12/17/2007)
12/17/2007	101	SUPPLEMENT of CPCL Plaintiffs' Supplemental Brief Pursuant to Order of December 17, 2007 by Plaintiff Chicanos Por La Causa, Inc. (Weissglass, Jonathan) (Entered: 12/17/2007)
12/18/2007	102	SUPPLEMENT of Supplemental Brief in Support of Motion for Injunction Pending Appeal Pursuant to This Court's December 17, 2007 Order by Plaintiffs Arizona Contractors Association, Inc., Arizona Employers for Immigration Reform Inc, Chamber of Commerce of the USA, Arizona Chamber of Commerce, Arizona Hispanic Chamber of Commerce Inc, Arizona Farm Bureau Federation, Arizona Restaurant and Hospitality Association, Associated Minority Contrac-

DATE	NO.	PROCEEDINGS
		tors of America, Arizona Roofing Contractors Association, National Roofing Contractors Association, Arizona Landscape Contractors Association Inc. (Selden, David) (Entered: 12/18/2007)
12/18/2007		Ninth Circuit Case Number 07-17272 (per time schedule order) for 90 Notice of Appeal. (REW,) (Entered: 12/18/2007)
12/18/2007		Ninth Circuit Case Number 07-17274 (per time schedule order) for 92 Notice of Appeal (REW,) (Entered: 12/18/2007)
12/18/2007	103	RESPONSE to Motion re 94 MOTION for Preliminary Injunction filed by Terry Goddard, Gale Garriott, Janet Napolitano. (Munns, Christopher) (Entered: 12/18/2007)
12/18/2007	104	Minute Entry. Proceedings held before Judge Neil V Wake: Motion Hearing held on 12/18/2007 re 91 , 94 MOTIONS for Preliminary Injunction Pending Appeal. Pending motions are taken under advisement. Preliminary Injunction Hearing set for 1/16/2008 and 1/17/2008 09:00 AM before Judge Neil V Wake. (SEE DOCUMENT FOR FULL DETAILS) (Court Reporter Laurie Adams.)(REW,) (Entered: 12/19/2007)

DATE	NO.	PROCEEDINGS
12/20/2007	105	TRANSCRIPT DESIGNATION AND ORDER FORM by Chicanos Por La Causa, Inc. for proceedings held on 9/14/07; 11/14/07; and 12/18/07 before Judge Neil V. Wake, re 92 Notice of Appeal, 90 Notice of Appeal, (Weissglass, Jonathan) (Entered: 12/20/2007)
12/21/2007	106	ORDER denying 91 , 94 Motions for Injunction Pending Appeal. Signed by Judge Neil V Wake on 12/21/07. (REW,) (Entered: 12/21/2007)
01/02/2008	107	TRANSCRIPT of Proceedings re: Motion Hearing and Scheduling Conference re Prelliminary Injunction held on 12/18/07 before Judge Neil V Wake. Court Reporter: Laurie A Adams. Transcript may be viewed at the court public terminal or purchased through the Court Reporter/Transcriber before the deadline for Release of Transcript Restriction. After that date it may be obtained through PACER. Redaction Request due 1/23/2008. Redacted Transcript Deadline set for 2/4/2008. Release of Transcript Restriction set for 4/1/2008. (BAS,) (Entered: 01/10/2008)
01/10/2008	108	NOTICE OF FILING OF OFFICIAL TRANSCRIPT (BAS,) (Entered: 01/10/2008)

DATE	NO.	PROCEEDINGS
04/03/2009	109	MANDATE of 9th Circuit (Certified Copy), affirming the decision of the District Court, re: 07-17272, 07-17274 92 , 90 Notices of Appeal (Attachments: # 1 Order and Amended Opinion, # 2 Opinion, # 3 NDA) (NOTE: mandate also lists 07-17289 as related to the case number, which was opened at the 9CCA in error)(REW,) (Entered: 04/03/2009)
07/07/2010	110	Appeal Document re 90 Notice of Appeal and 92 Notice of Appeal, appeal case number 07-17272 07-17274; Notice from the United States Supreme Court GRANTING the petition for writ of certiorari on 06/28/10. Supreme Court case number 09-115. (ESL) (Entered: 07/07/2010)

U.S. DISTRICT COURT
DISTRICT OF ARIZONA (PHOENIX DIVISION)

Civil Docket For Case # 2:07-cv-01684-NVW
Date Filed: 09/04/2007

CHICANOS POR LA CAUSA, INC, et al.

v.

NAPOLITANO, et al.

DOCKET ENTRIES

DATE	NO.	PROCEEDINGS
09/04/2007	1	COMPLAINT. Filing fee received: $ 350.00, receipt number 1429209, filed by Chicanos Por La Causa. (Attachments: # 1 Exhibit A# 2 Exhibit B# 3 Civil Cover Sheet # 4 Summons Napolitano# 5 Summons Goddard # 6 Summons Garriott)(Campbell, Kristina) (Entered: 09/04/2007)
09/04/2007		This case has been assigned to the Honorable Michelle H. Burns. All future pleadings or documents should bear the correct case number: CIV-07-1684-PHX-MHB. (entered by HLA) (Entered: 09/05/2007)
09/04/2007	3	Magistrate Election Form Deadline (Attachments: # 1 Magistrate Consent Form Instructions)(HLA) (Entered: 09/05/2007)

DATE	NO.	PROCEEDINGS
09/05/2007	2	Summons Issued as to Janet Napolitano, Terry Goddard, and Gale Garriott. (Attachments: # 1 Summons Janet Napolitano # 2 Summons Terry Goddard)(HLA)*** IMPORTANT: You must select "Document and stamps" or "Document and comments" on the print screen in order for the court seal to appear on the summons you print. (Entered: 09/05/2007)
09/05/2007	4	NOTICE TO FILER OF DEFICIENCY re 1 Complaint, filed by Chicanos Por La Causa, Inc. Description of deficiency: The following parties were added in duplicate (twice): Janet Napolitano, Terry Goddard, and Gale Garriott. (HLA) (Entered: 09/05/2007)
09/05/2007	9	MOTION for Admission Pro Hac Vice as to attorney Stephen P Berzon on behalf of plaintiffs Chicanos Por La Causa, Inc., and Somos America. (BAS,) (Entered: 09/10/2007)
09/05/2007	10	MOTION for Admission Pro Hac Vice as to attorney Jonathan Weissglass on behalf of plaintiffs Chicanos Por La Causa, Inc., and Somos America. (BAS,) (Entered: 09/10/2007)
09/06/2007		Notice of request for e-notices by David Selden seldend@ballardspahr.com. (Selden, David) (Entered: 09/06/2007)
09/06/2007	5	MOTION for Preliminary Injunction *and Memorandum of Points and Au-*

DATE	NO.	PROCEEDINGS
		thorities by Chicanos Por La Causa, Inc., Somos America. (Attachments: # 1 Text of Proposed Order Granting Preliminary Injunction# 2 Declaration of Edmundo Hidalgo# 3 Declaration of Tyler Moran# 4 Exhibit A to Declaration of Tyler Moran# 5 Exhibit B to Declaration of Tyler Moran# 6 Exhibit C to Declaration of Tyler Moran# 7 Exhibit D to Declation of Tyler Moran# 8 Exhibit E to Declaration of Tyler Moran# 9 Exhibit F to Declaration of Tyler Moran# 10 Exhibit G to Declaration of Tyler Moran# 11 Exhibit H to Declaration of Tyler Moran# 12 Exhibit I to Declaration of Tyler Moran# 13 Exhibit J to Declaration of Tyler Moran)(Campbell, Kristina) (Entered: 09/06/2007)
09/07/2007	6	Notice re of Service of Defendants' Motion to Transfer and Consolidate by Janet Napolitano, Terry Goddard, Gale Garriott (Attachments: # 1 # 2) (O'Grady, Mary) (Entered: 09/07/2007)
09/07/2007	11	MOTION for Admission Pro Hac Vice as to attorney Omar Jadwat on behalf of plaintiffs Chicanos Por La Causa, Inc., and Somos America. (BAS,) (Entered: 09/10/2007)
09/10/2007	7	NOTICE of Appearance by Mary Ruth O'Grady on behalf of all defendants (O'Grady, Mary) (Entered: 09/10/2007)

DATE	NO.	PROCEEDINGS
09/10/2007	8	NOTICE of Appearance by Christopher Arthur Munns on behalf of all defendants (Munns, Christopher) (Entered: 09/10/2007)
09/10/2007		PRO HAC VICE FEE PAID. $ 100, receipt number PHX061975 as to Stephen P Berzon. (BAS,) (Entered: 09/10/2007)
09/10/2007		PRO HAC VICE FEE PAID. $ 100, receipt number PHX061976 as to Jonathan Weissglass. (BAS,) (Entered: 09/10/2007)
09/10/2007		PRO HAC VICE FEE PAID. $ 100, receipt number PHX062042 as to Omar C Jadwat. (BAS,) (Entered: 09/10/2007)
09/10/2007	12	ORDER pursuant to General Order 05-25 granting 9 Motion for Admission Pro Hac Vice; granting 10 Motion for Admission Pro Hac Vice; granting 11 Motion for Admission Pro Hac Vice. Per the Court's Administrative Policies and Procedures Manual, applicant has five (5) days in which to register as a user of the Electronic Filing System. Registration to be accomplished via the court's website at www.azd.uscourts.gov. (BAS,)(This is a TEXT ENTRY ONLY. There is no.pdf document associated with this entry.) (Entered: 09/10/2007)

DATE	NO.	PROCEEDINGS
09/10/200713		ORDER re 6 Defendants' Motion to Transfer and Consolidate. Hearing set for 9/14/2007 at 2:30 PM before Judge Neil V. Wake. Signed by Judge Neil V. Wake on 9/10/2007. (NVW,) (Entered: 09/10/2007)
09/10/2007	14	RESPONSE re 6 Other Notice *Plaintiffs' Response to Defendants' Motion to Transfer and Consolidate Case* by Plaintiffs Chicanos Por La Causa, Inc., Somos America. (Campbell, Kristina) (Entered: 09/10/2007)
09/14/2007	15	Minute Entry. Proceedings held before Judge Neil V Wake : Scheduling Conference, re: preliminary injunction AND Motion Hearing, re: motion to consolidate held on 9/14/2007. The Motion to Consolidate Cases and Transfer is GRANTED and CV07-1684-PHX-MHB is consolidated into CV07-1355-PHX-NVW and transferred to this division, but Answers in each case are to be filed separately. (Court Reporter Laurie Adams.)(REW (Court Reporter Laurie Adams.)(REW,) (Entered: 09/17/2007)
09/21/2007	16	SUMMONS Returned Executed by Chicanos Por La Causa, Inc., Somos America. Janet Napolitano served on 9/6/2007. (Weissglass, Jonathan) (Entered: 09/21/2007)

DATE	NO.	PROCEEDINGS
09/21/2007	17	SUMMONS Returned Executed by Chicanos Por La Causa, Inc., Somos America. Gale Garriott served on 9/6/2007. (Weissglass, Jonathan) (Entered: 09/21/2007)
09/21/2007	18	SUMMONS Returned Executed by Chicanos Por La Causa, Inc., Somos America. Terry Goddard served on 9/6/2007. (Weissglass, Jonathan) (Entered: 09/21/2007)
09/24/2007	19	MOTION for Admission Pro Hac Vice as to attorney Cynthia Valenzuela by Chicanos Por La Causa, Inc. (Valenzuela, Cynthia) Modified on 9/25/2007 (DMT,). CERTIFICATE OF GOOD STANDING IS TOO OLD. ATTORNEY TO REFILE IN LEAD CASE CV 07-1355-PHX-NVW. (Entered: 09/24/2007)
09/24/2007	21	MOTION for Admission Pro Hac Vice as to attorney Monica T Guizar on behalf of plaintiffs Chicanos Por La Causa, Inc., and Somos America. (BAS,) (Entered: 09/25/2007)
09/24/2007	22	MOTION for Admission Pro Hac Vice as to attorney Karen C Tumlin on behalf of plaintiffs Chicanos Por La Causa, Inc., and Somos America. (BAS,) (Entered: 09/25/2007)
09/24/2007	23	MOTION for Admission Pro Hac Vice as to attorney Linton Joaquin on behalf of plaintiffs Chicanos Por La

DATE	NO.	PROCEEDINGS
		Causa, Inc., and Somos America. (BAS,) (Entered: 09/25/2007)
09/25/2007	20	NOTICE TO FILER OF DEFICIENCY re 19 MOTION for Admission Pro Hac Vice as to attorney Cynthia Valenzuela filed by Chicanos Por La Causa, Inc. Description of deficiency: Certificate of Good Standing is too old. (DMT,) (Entered: 09/25/2007)
09/25/2007		PRO HAC VICE FEE PAID. $ 100, receipt number PHX062619 as to Monica T Guizar. (BAS,) (Entered: 09/25/2007)
09/25/2007		PRO HAC VICE FEE PAID. $ 100, receipt number PHX062620 as to Karen C Tumlin. (BAS,) (Entered: 09/25/2007)
09/25/2007		PRO HAC VICE FEE PAID. $ 100, receipt number PHX062621 as to Linton Joaquin. (BAS,) (Entered: 09/25/2007)
09/25/2007	24	ORDER pursuant to General Order 05-25 granting 21 Motion for Admission Pro Hac Vice; granting 22 Motion for Admission Pro Hac Vice; granting 23 Motion for Admission Pro Hac Vice. Per the Court's Administrative Policies and Procedures Manual, applicant has five (5) days in which to register as a user of the Electronic Filing System. Registration to be accomplished via the court's website at

DATE	NO.	PROCEEDINGS
		www.azd.uscourts.gov. (BAS,)(This is a TEXT ENTRY ONLY. There is no.pdf document associated with this entry.) (Entered: 09/25/2007)
09/25/2007	25	MOTION for Admission Pro Hac Vice as to attorney Cynthia Valenzuela by Chicanos Por La Causa, Inc. (Valenzuela, Cynthia) (Entered: 09/25/2007)
09/25/2007		PRO HAC VICE FEE PAID. $ 100, receipt number PHX062734 as to Cynthia Ann Valenzuela. (BAS,) (Entered: 09/25/2007)
09/25/2007	26	ORDER pursuant to General Order 05-25 granting 25 Motion for Admission Pro Hac Vice. Per the Court's Administrative Policies and Procedures Manual, applicant has five (5) days in which to register as a user of the Electronic Filing System. Registration to be accomplished via the court's website at www.azd.uscourts.gov. (BAS,) (This is a TEXT ENTRY ONLY. There is no.pdf document associated with this entry.) (Entered: 09/25/2007)
09/25/2007	27	MOTION to Supplement *Supplemental Memorandum of Points and Authorities Pursuant to Order of September 14, 2007* by Chicanos Por La Causa, Inc., Somos America. (Weissglass, Jonathan) (Entered: 09/25/2007)

DATE	NO.	PROCEEDINGS
09/26/2007	28	MOTION to Dismiss Case by Janet Napolitano, Terry Goddard, Gale Garriott. (Munns, Christopher) (Entered: 09/26/2007)
09/28/2007	29	MOTION for Admission Pro Hac Vice as to attorney Lucas Guttentag on behalf of plaintiffs Chicanos Por La Causa, Inc., and Somos America. (BAS,) (Entered: 09/28/2007)
09/28/2007	30	MOTION for Admission Pro Hac Vice as to attorney Jennifer C Chang on behalf of plaintiffs Chicanos Por La Causa, Inc., and Somos America. (BAS,) (Entered: 09/28/2007)
09/28/2007		PRO HAC VICE FEE PAID. $ 100, receipt number PHX062828 as to Lucas Guttentag. (BAS,) (Entered: 09/28/2007)
09/28/2007		PRO HAC VICE FEE PAID. $ 100, receipt number PHX062827 as to Jennifer C Chang. (BAS,) (Entered: 09/28/2007)
09/28/2007	31	ORDER pursuant to General Order 05-25 granting 29 Motion for Admission Pro Hac Vice; granting 30 Motion for Admission Pro Hac Vice. Per the Court's Administrative Policies and Procedures Manual, applicant has five (5) days in which to register as a user of the Electronic Filing System. Registration to be accomplished via the court's website at www.azd.uscourts.

DATE	NO.	PROCEEDINGS
		gov. (BAS,)(This is a TEXT ENTRY ONLY. There is no.pdf document associated with this entry.) (Entered: 09/28/2007)
10/11/2007		Remark as to attorney Marielena Hincapie National Immigration Law Ctr 3435 Wilshire Blvd Ste 2850 Los Angeles CA 90010 removed from database for noncompliance with admissions procedures; party represented by other admitted counsel. (BAS,) (Entered: 10/11/2007)
10/11/2007	32	TRANSCRIPT DESIGNATION AND ORDER FORM by Chicanos Por La Causa, Inc. for proceedings held on 9/14/07 before Judge Neil V Wake. (BAS,) (Entered: 10/12/2007)
12/07/2007	33	JUDGMENT IN A CIVIL CASE - IT IS ORDERED AND ADJUDGED that pursuant to the Court's order dated December 7, 2007, judgment is entered against plaintiffs. Plaintiffs to take nothing, and complaint and action are dismissed without prejudice for lack of subject matter jurisdiction, there being no justiciable case or controversy against the Defendants. (SAT) (Entered: 12/11/2007)
12/17/2007		Appeal Remark; 2 appeals filed in lead case, CV 07-1355-PHX-NVW (#90, #92) on 12/13/07 (REW,) (Entered: 12/17/2007)

DATE	NO.	PROCEEDINGS
04/03/2009		Appeal Remark; mandate filed in lead case (#109) on 4/3/09 (REW,) (Entered: 04/03/2009)

U.S. DISTRICT COURT
DISTRICT OF ARIZONA (PHOENIX DIVISION)

Civil Docket For Case # 2:07-cv-02496-NVW
Date Filed: 12/09/2007

ARIZONA CONTRACTORS ASSOCIATION, INC., et al.

v.

CANDELARIA, et al.

DOCKET ENTRIES

DATE	NO.	PROCEEDINGS
12/09/2007	1	COMPLAINT. Filing fee received: $ 350.00, receipt number 0970000000001598760 (TRO Requested), filed by Arizona Contractors Association, Inc. (Selden, David) (Entered: 12/10/2007)
12/10/2007	2	Corporate Disclosure Statement by Arizona Contractors Association, Inc. (Selden, David) (Entered: 12/10/2007)
12/10/2007	3	Additional Attachments to Main Document *Civil Cover Sheet* by Plaintiff Arizona Contractors Association, Inc. (Selden, David) (Entered: 12/10/2007)
12/10/2007	4	MOTION for Temporary Restraining Order *and Preliminary Injunction* by Arizona Contractors Association, Inc. (Selden, David) (Entered: 12/10/2007)

DATE	NO.	PROCEEDINGS
12/10/2007		Notice of request for e-notices by Faith Klepper. (Klepper, Faith) (Entered: 12/10/2007)
12/10/2007	5	Notice re Summons by Arizona Employers for Immigration Reform, Inc., Chamber of Commerce of the USA, Arizona Chamber of Commerce, Arizona Hispanic Chamber of Commerce, Inc., Arizona Farm Bureau Federation, Arizona Restaurant and Hospitality Association, Arizona Contractors Association, Inc., Associated Minority Contractors of America (Attachments: # 1 Summons Cochise County, # 2 Summons Coconino County, # 3 Summons Flores Gila County, # 4 Summons Angle Graham, # 5 Summons Rapier Greenlee, # 6 Summons Brannan La Paz, # 7 Summons Thomas Maricopa, # 8 Summons Currier Navajo, # 9 Summons LaWall Pima, # 10 Summons Walsh Pinal County, # 11 Summons Silva Santa Cruz County, # 12 Summons Polk Yavapai County, # 13 Summons Smith Yuma, # 14 Summons Goddard AG, # 15 Summons Garcia ROC, # 16 Summons Smith Mohave)(Selden, David) (Entered: 12/10/2007)
12/10/2007	6	ORDER REASSIGNING CASE. Case reassigned to Judge Mary H Murguia for all further proceedings. Judge Earl H Carroll no longer assigned to case.

DATE	NO.	PROCEEDINGS
		All future pleadings should now list the following complete case number: CV 07-2496 PHX-MHM. Signed by Judge Earl H Carroll on 12/10/07. (Attachments: # 1 Letter of Reassignment)(LSP) (Entered: 12/10/2007)
12/10/2007	7	Joint MOTION to Expedite Motion for Expedited Discovery and to Waive Rule 26(d) by Arizona Employers for Immigration Reform, Inc., Chamber of Commerce of the USA, Arizona Chamber of Commerce, Arizona Hispanic Chamber of Commerce, Inc., Arizona Farm Bureau Federation, Arizona Restaurant and Hospitality Association, Arizona Contractors Association, Inc., Associated Minority Contractors of America, Arizona Roofing Contractors Association, National Roofing Contractors' Association, Wake Up Arizona! Inc., Arizona Landscape Contractors Association, Inc. (Selden, David) (Entered: 12/10/2007)
12/10/2007		Notice of request for e-notices by Barry H. Uhrman. (Uhrman, Barry) (Entered: 12/10/2007)
12/10/2007	8	Notice re Summons of Terence Haner by Arizona Employers for Immigration Reform, Inc., Chamber of Commerce of the USA, Arizona Chamber of Commerce, Arizona Hispanic Chamber of Commerce, Inc., Arizona Farm Bureau Federation, Arizona

DATE	NO.	PROCEEDINGS
		Restaurant and Hospitality Association, Arizona Contractors Association, Inc., Associated Minority Contractors of America, Arizona Roofing Contractors Association, National Roofing Contractors' Association, Wake Up Arizona! Inc., Arizona Landscape Contractors Association, Inc. (Selden, David) (Entered: 12/10/2007)
12/10/2007	9	Summons Issued as to Criss Candelaria, Ed Rheinheimer, Daisy Flores, Kenny Angle, Derek D Rapier, Martin Brannan, Andrew P Thomas, Matthew J Smith, James Currier, Barbara LaWall, James P Walsh, George Silva, Sheila Polk, Jon Smith, Terry Goddard, Fidelis V Garcia. (Attachments: # 1 Angle, # 2 Brannan, # 3 Currier, # 4 Flores, # 5 Garcia, # 6 Goddard, # 7 LaWall, # 8 Matthew, # 9 Polk, # 10 Rapier, # 11 Rheinheimer, # 12 Silva, # 13 Smith, # 14 Thomas, # 15 Walsh)(REK). *** IMPORTANT: You must select "Document and stamps" or "Document and comments" on the print screen in order for the court seal to appear on the summons you print. (Entered: 12/10/2007)
12/10/2007	10	Summons Issued as to Terence C Haner. (REK). *** IMPORTANT: You must select "Document and stamps" or "Document and comments" on the print screen in order for the court seal

DATE	NO.	PROCEEDINGS
		to appear on the summons you print. (Entered: 12/10/2007)
12/10/2007	11	MOTION for Leave to File Excess Pages for Motion to Exceed Page Limit by Arizona Employers for Immigration Reform, Inc., Chamber of Commerce of the USA, Arizona Chamber of Commerce, Arizona Hispanic Chamber of Commerce, Inc., Arizona Farm Bureau Federation, Arizona Restaurant and Hospitality Association, Arizona Contractors Association, Inc., Associated Minority Contractors of America, Arizona Roofing Contractors Association, National Roofing Contractors' Association, Wake Up Arizona! Inc., Arizona Landscape Contractors Association, Inc. (Selden, David) (Entered: 12/10/2007)
12/10/2007	12	LODGED Proposed Legal Brief in Support of Temporary Restraining Order and Motion for Preliminary Injunction re: 11 MOTION for Leave to File Excess Pages for Motion to Exceed Page Limit. Document to be filed by Clerk if Motion to Leave to File or Amend is granted. Filed by Arizona Employers for Immigration Reform, Inc., Chamber of Commerce of the USA, Arizona Chamber of Commerce, Arizona Hispanic Chamber of Commerce, Inc., Arizona Farm Bureau Federation, Arizona Restaurant and

DATE	NO.	PROCEEDINGS
		Hospitality Association, Arizona Contractors Association, Inc., Associated Minority Contractors of America, Arizona Roofing Contractors Association, National Roofing Contractors' Association, Wake Up Arizona! Inc., Arizona Landscape Contractors Association, Inc. (Selden, David) (Entered: 12/10/2007)
12/10/2007	13	MOTION for Protective Order *Regarding John Doe Members* by Arizona Employers for Immigration Reform, Inc., Chamber of Commerce of the USA, Arizona Chamber of Commerce, Arizona Hispanic Chamber of Commerce, Inc., Arizona Farm Bureau Federation, Arizona Restaurant and Hospitality Association, Arizona Contractors Association, Inc., Associated Minority Contractors of America, Arizona Roofing Contractors Association, National Roofing Contractors' Association, Wake Up Arizona! Inc., Arizona Landscape Contractors Association, Inc. (Selden, David) (Entered: 12/10/2007)
12/11/2007	14	ORDER REASSIGNING CASE. Case reassigned to Judge Neil V Wake for all further proceedings. Judge Mary H Murguia no longer assigned to case. All future pleadings in this matter should list the following complete case number: CV 07-2496 PHX-NVW.

DATE	NO.	PROCEEDINGS
		Signed by Judge Mary H Murguia on 12/10/07. (Attachments: # 1 Reassignment Letter)(LSP) (Entered: 12/11/2007)
12/11/2007	15	NOTICE of Appearance by Mary Ruth O'Grady on behalf of Terry Goddard, Fidelis V Garcia (O'Grady, Mary) (Entered: 12/11/2007)
12/11/2007	16	Notice re Summons to Melvin R. Bowers, Jr., Navajo County Attorney by Arizona Employers for Immigration Reform, Inc., Chamber of Commerce of the USA, Arizona Chamber of Commerce, Arizona Hispanic Chamber of Commerce, Inc., Arizona Farm Bureau Federation, Arizona Restaurant and Hospitality Association, Arizona Contractors Association, Inc., Associated Minority Contractors of America, Arizona Roofing Contractors Association, National Roofing Contractors' Association, Wake Up Arizona! Inc., Arizona Landscape Contractors Association, Inc. (Selden, David) (Entered: 12/11/2007)
12/11/2007	17	NOTICE of Appearance by Eileen Dennis GilBride on behalf of Andrew P Thomas (GilBride, Eileen) (Entered: 12/11/2007)
12/11/2007	18	ORDER - IT IS ORDERED that Plaintiffs' 11 Motion to Exceed Page Limit is granted, and Plaintiff's Legal Brief

DATE	NO.	PROCEEDINGS
		in Support of Temporary Restraining Order and Motion for Preliminary Injunction (lodged at doc. #12) shall be deemed filed December 10, 2007. Signed by Judge Neil V Wake on 12/11/07.(SAT) (Entered: 12/11/2007)
12/11/2007	19	Legal BRIEF in Support of 4 MOTION for Temporary Restraining Order and Preliminary Injunction filed by Plaintiffs Arizona Employers for Immigration Reform, Inc., Chamber of Commerce of the USA, Arizona Chamber of Commerce, Arizona Hispanic Chamber of Commerce, Inc., Arizona Farm Bureau Federation, Arizona Restaurant and Hospitality Association, Arizona Contractors Association, Inc., Associated Minority Contractors of America, Arizona Roofing Contractors Association, National Roofing Contractors' Association, Wake Up Arizona! Inc., Arizona Landscape Contractors Association, Inc. (SAT) (Entered: 12/11/2007)
12/12/2007	20	NOTICE of Appearance by Christopher Arthur Munns on behalf of Terry Goddard, Fidelis V Garcia (Munns, Christopher) (Entered: 12/12/2007)
12/12/2007	21	MOTION for Admission Pro Hac Vice as to attorney Louis R. Moffa *Jr.* by Arizona Employers for Immigration Reform, Inc., Chamber of Commerce of the USA, Arizona Chamber of

DATE	NO.	PROCEEDINGS
		Commerce, Arizona Hispanic Chamber of Commerce, Inc., Arizona Farm Bureau Federation, Arizona Restaurant and Hospitality Association, Arizona Contractors Association, Inc., Associated Minority Contractors of America, Arizona Roofing Contractors Association, National Roofing Contractors' Association, Arizona Landscape Contractors Association, Inc. (Moffa, Louis) (Entered: 12/12/2007)
12/12/2007		Notice of request for e-notices by Donald Peder Johnsen. (Johnsen, Donald) (Entered: 12/12/2007)
12/12/2007		PRO HAC VICE FEE PAID. $ 100, receipt number PHX065701 as to Louis R Moffa, Jr. (BAS,) (Entered: 12/12/2007)
12/12/2007	22	ORDER pursuant to General Order 05-25 granting 21 Motion for Admission Pro Hac Vice. Per the Court's Administrative Policies and Procedures Manual, applicant has five (5) days in which to register as a user of the Electronic Filing System. Registration to be accomplished via the court's website at www.azd.uscourts. gov. (BAS,) (This is a TEXT ENTRY ONLY. There is no.pdf document associated with this entry.) (Entered: 12/12/2007)
12/13/2007		Notice of request for e-notices by Jill J. Chasson. (Chasson, Jill) (Entered: 12/13/2007)

DATE	NO.	PROCEEDINGS
12/13/2007	23	ORDER setting hearing on 4 MOTION for Temporary Restraining Order for 12/18/2007 at 1:30 PM in Courtroom 504, 401 West Washington Street, Phoenix, AZ 85003 before Judge Neil V. Wake. Signed by Judge Neil V. Wake on 12/13/2007. (NVW,) (Entered: 12/13/2007)
12/13/2007		Notice of request for e-notices by Jeffrey Toppel. (Toppel, Jeffrey) (Entered: 12/13/2007)
12/13/2007	24	NOTICE of Appearance by Michael Jay Lessler on behalf of Terence C Haner (Lessler, Michael) (Entered: 12/13/2007)
12/13/2007	25	SUMMONS Returned Executed by Arizona Employers for Immigration Reform, Inc., Chamber of Commerce of the USA, Arizona Chamber of Commerce, Arizona Hispanic Chamber of Commerce, Inc., Arizona Farm Bureau Federation, Arizona Restaurant and Hospitality Association, Arizona Contractors Association, Inc., Associated Minority Contractors of America, Arizona Roofing Contractors Association, National Roofing Contractors' Association, Wake Up Arizona! Inc., Arizona Landscape Contractors Association, Inc. Andrew P Thomas served on 12/10/2007. (Selden, David) (Entered: 12/13/2007)

DATE	NO.	PROCEEDINGS
12/13/2007	26	SUMMONS Returned Executed by Arizona Employers for Immigration Reform, Inc., Chamber of Commerce of the USA, Arizona Chamber of Commerce, Arizona Hispanic Chamber of Commerce, Inc., Arizona Farm Bureau Federation, Arizona Restaurant and Hospitality Association, Arizona Contractors Association, Inc., Associated Minority Contractors of America, Arizona Roofing Contractors Association, National Roofing Contractors' Association, Wake Up Arizona! Inc., Arizona Landscape Contractors Association, Inc. Fidelis V Garcia served on 12/10/2007. (Selden, David) (Entered: 12/13/2007)
12/13/2007	27	SUMMONS Returned Executed by Arizona Employers for Immigration Reform, Inc., Chamber of Commerce of the USA, Arizona Chamber of Commerce, Arizona Hispanic Chamber of Commerce, Inc., Arizona Farm Bureau Federation, Arizona Restaurant and Hospitality Association, Arizona Contractors Association, Inc., Associated Minority Contractors of America, Arizona Roofing Contractors Association, National Roofing Contractors' Association, Wake Up Arizona! Inc., Arizona Landscape Contractors Association, Inc. Terry Goddard served on 12/10/2007. (Selden, David) (Entered: 12/13/2007)

DATE	NO.	PROCEEDINGS
12/14/2007	28	NOTICE of Appearance by Chris Myrl Roll on behalf of James P Walsh (Roll, Chris) (Entered: 12/14/2007)
12/14/2007	29	CONSOLIDATION ORDER - LEAD CASE with Member Case CV 07-2518 PHX-FJM. Plaintiff's 2 Motion to Reassign and Consolidate in CV 07-2518 is granted. Motion Hearing re 3 Motion for Temporary Restraining Order is set for 12/18/07 at 1:30. Signed by Judge Neil V Wake on 12/14/07. (Attachments: # 1 Letter)(LSP) (Entered: 12/14/2007)
12/14/2007	30	SUMMONS Returned Executed by Arizona Employers for Immigration Reform, Inc., Chamber of Commerce of the USA, Arizona Chamber of Commerce, Arizona Hispanic Chamber of Commerce, Inc., Arizona Farm Bureau Federation, Arizona Restaurant and Hospitality Association, Arizona Contractors Association, Inc., Associated Minority Contractors of America, Arizona Roofing Contractors Association, National Roofing Contractors' Association, Wake Up Arizona! Inc., Arizona Landscape Contractors Association, Inc. James P Walsh served on 12/11/2007. (Selden, David) (Entered: 12/14/2007)
12/14/2007	31	SUMMONS Returned Executed by Arizona Employers for Immigration Reform, Inc., Chamber of Commerce

DATE	NO.	PROCEEDINGS
		of the USA, Arizona Chamber of Commerce, Arizona Hispanic Chamber of Commerce, Inc., Arizona Farm Bureau Federation, Arizona Restaurant and Hospitality Association, Arizona Contractors Association, Inc., Associated Minority Contractors of America, Arizona Roofing Contractors Association, National Roofing Contractors' Association, Wake Up Arizona! Inc., Arizona Landscape Contractors Association, Inc. Barbara LaWall served on 12/11/2007. (Selden, David) (Entered: 12/14/2007)
12/14/2007	32	SUMMONS Returned Executed by Arizona Employers for Immigration Reform, Inc., Chamber of Commerce of the USA, Arizona Chamber of Commerce, Arizona Hispanic Chamber of Commerce, Inc., Arizona Farm Bureau Federation, Arizona Restaurant and Hospitality Association, Arizona Contractors Association, Inc., Associated Minority Contractors of America, Arizona Roofing Contractors Association, National Roofing Contractors' Association, Wake Up Arizona! Inc., Arizona Landscape Contractors Association, Inc. Daisy Flores served on 12/11/2007. (Selden, David) (Entered: 12/14/2007)
12/14/2007	33	SUMMONS Returned Executed by Arizona Employers for Immigration

DATE	NO.	PROCEEDINGS
		Reform, Inc., Chamber of Commerce of the USA, Arizona Chamber of Commerce, Arizona Hispanic Chamber of Commerce, Inc., Arizona Farm Bureau Federation, Arizona Restaurant and Hospitality Association, Arizona Contractors Association, Inc., Associated Minority Contractors of America, Arizona Roofing Contractors Association, National Roofing Contractors' Association, Wake Up Arizona! Inc., Arizona Landscape Contractors Association, Inc. Jon Smith served on 12/12/2007. (Selden, David) (Entered: 12/14/2007)
12/14/2007	34	SUMMONS Returned Executed by Arizona Employers for Immigration Reform, Inc., Chamber of Commerce of the USA, Arizona Chamber of Commerce, Arizona Hispanic Chamber of Commerce, Inc., Arizona Farm Bureau Federation, Arizona Restaurant and Hospitality Association, Arizona Contractors Association, Inc., Associated Minority Contractors of America, Arizona Roofing Contractors Association, National Roofing Contractors' Association, Wake Up Arizona! Inc., Arizona Landscape Contractors Association, Inc. Sheila Polk served on 12/12/2007. (Selden, David) (Entered: 12/14/2007)

DATE	NO.	PROCEEDINGS
12/14/2007	35	SUMMONS Returned Executed by Arizona Employers for Immigration Reform, Inc., Chamber of Commerce of the USA, Arizona Chamber of Commerce, Arizona Hispanic Chamber of Commerce, Inc., Arizona Farm Bureau Federation, Arizona Restaurant and Hospitality Association, Arizona Contractors Association, Inc., Associated Minority Contractors of America, Arizona Roofing Contractors Association, National Roofing Contractors' Association, Wake Up Arizona! Inc., Arizona Landscape Contractors Association, Inc. Matthew J Smith served on 12/13/2007. (Selden, David) (Entered: 12/14/2007)
12/14/2007	36	SUMMONS Returned Executed by Arizona Employers for Immigration Reform, Inc., Chamber of Commerce of the USA, Arizona Chamber of Commerce, Arizona Hispanic Chamber of Commerce, Inc., Arizona Farm Bureau Federation, Arizona Restaurant and Hospitality Association, Arizona Contractors Association, Inc., Associated Minority Contractors of America, Arizona Roofing Contractors Association, National Roofing Contractors' Association, Wake Up Arizona! Inc., Arizona Landscape Contractors Association, Inc. Martin Brannan served on 12/13/2007. (Selden, David) (Entered: 12/14/2007)

DATE	NO.	PROCEEDINGS
12/14/2007	37	SUMMONS Returned Executed by Arizona Employers for Immigration Reform, Inc., Chamber of Commerce of the USA, Arizona Chamber of Commerce, Arizona Hispanic Chamber of Commerce, Inc., Arizona Farm Bureau Federation, Arizona Restaurant and Hospitality Association, Arizona Contractors Association, Inc., Associated Minority Contractors of America, Arizona Roofing Contractors Association, National Roofing Contractors' Association, Wake Up Arizona! Inc., Arizona Landscape Contractors Association, Inc. Criss Candelaria served on 12/12/2007. (Selden, David) (Entered: 12/14/2007)
12/14/2007	38	SUMMONS Returned Executed by Arizona Employers for Immigration Reform, Inc., Chamber of Commerce of the USA, Arizona Chamber of Commerce, Arizona Hispanic Chamber of Commerce, Inc., Arizona Farm Bureau Federation, Arizona Restaurant and Hospitality Association, Arizona Contractors Association, Inc., Associated Minority Contractors of America, Arizona Roofing Contractors Association, National Roofing Contractors' Association, Wake Up Arizona! Inc., Arizona Landscape Contractors Association, Inc. James Currier served on 12/12/2007. (Selden, David) (Entered: 12/14/2007)

DATE	NO.	PROCEEDINGS
12/14/2007	39	SUMMONS Returned Executed by Arizona Employers for Immigration Reform, Inc., Chamber of Commerce of the USA, Arizona Chamber of Commerce, Arizona Hispanic Chamber of Commerce, Inc., Arizona Farm Bureau Federation, Arizona Restaurant and Hospitality Association, Arizona Contractors Association, Inc., Associated Minority Contractors of America, Arizona Roofing Contractors Association, National Roofing Contractors' Association, Wake Up Arizona! Inc., Arizona Landscape Contractors Association, Inc. Terence C Haner served on 12/12/2007. (Selden, David) (Entered: 12/14/2007)
12/14/2007	40	RESPONSE to Motion re 7 Joint MOTION to Expedite Motion for Expedited Discovery and to Waive Rule 26(d) Joint MOTION to Expedite Motion for Expedited Discovery and to Waive Rule 26(d) Joint MOTION to Expedite Motion for Expedited Discovery and to Waive Rule 26(d) filed by Criss Candelaria. (O'Grady, Mary) (Entered: 12/14/2007)
12/14/2007	41	SUMMONS Returned Executed by Arizona Employers for Immigration Reform, Inc., Chamber of Commerce of the USA, Arizona Chamber of Commerce, Arizona Hispanic Chamber of Commerce, Inc., Arizona Farm

DATE	NO.	PROCEEDINGS
		Bureau Federation, Arizona Restaurant and Hospitality Association, Arizona Contractors Association, Inc., Associated Minority Contractors of America, Arizona Roofing Contractors Association, National Roofing Contractors' Association, Wake Up Arizona! Inc., Arizona Landscape Contractors Association, Inc. Derek D Rapier served on 12/12/2007. (Selden, David) (Entered: 12/14/2007)
12/14/2007	42	SUMMONS Returned Executed by Arizona Employers for Immigration Reform, Inc., Chamber of Commerce of the USA, Arizona Chamber of Commerce, Arizona Hispanic Chamber of Commerce, Inc., Arizona Farm Bureau Federation, Arizona Restaurant and Hospitality Association, Arizona Contractors Association, Inc., Associated Minority Contractors of America, Arizona Roofing Contractors Association, National Roofing Contractors' Association, Wake Up Arizona! Inc., Arizona Landscape Contractors Association, Inc. Kenny Angle served on 12/12/2007. (Selden, David) (Entered: 12/14/2007)
12/14/2007	43	SUMMONS Returned Executed by Arizona Employers for Immigration Reform, Inc., Chamber of Commerce of the USA, Arizona Chamber of Commerce, Arizona Hispanic Cham-

DATE	NO.	PROCEEDINGS
		ber of Commerce, Inc., Arizona Farm Bureau Federation, Arizona Restaurant and Hospitality Association, Arizona Contractors Association, Inc., Associated Minority Contractors of America, Arizona Roofing Contractors Association, National Roofing Contractors' Association, Wake Up Arizona! Inc., Arizona Landscape Contractors Association, Inc. Ed Rheinheimer served on 12/12/2007. (Selden, David) (Entered: 12/14/2007)
12/14/2007	44	SUMMONS Returned Executed by Arizona Employers for Immigration Reform, Inc., Chamber of Commerce of the USA, Arizona Chamber of Commerce, Arizona Hispanic Chamber of Commerce, Inc., Arizona Farm Bureau Federation, Arizona Restaurant and Hospitality Association, Arizona Contractors Association, Inc., Associated Minority Contractors of America, Arizona Roofing Contractors Association, National Roofing Contractors' Association, Wake Up Arizona! Inc., Arizona Landscape Contractors Association, Inc. George Silva served on 12/12/2007. (Selden, David) (Entered: 12/14/2007)
12/14/2007	45	Notice re Notice of Service of Plaintiffs' First Request for Production of Documents and First Request for Admissions by Arizona Employers for

DATE	NO.	PROCEEDINGS
		Immigration Reform, Inc., Chamber of Commerce of the USA, Arizona Chamber of Commerce, Arizona Hispanic Chamber of Commerce, Inc., Arizona Farm Bureau Federation, Arizona Restaurant and Hospitality Association, Arizona Contractors Association, Inc., Associated Minority Contractors of America, Arizona Roofing Contractors Association, National Roofing Contractors' Association, Wake Up Arizona! Inc., Arizona Landscape Contractors Association, Inc. (Attachments: # 1 Exhibit Plaintiffs, # 2 Exhibit Plaintiffs' First Request for Production of Documents)(Selden, David) (Entered: 12/14/2007)
12/16/2007	46	Notice re Notice of Filing of Attachments to Legal Brief in Support of Motion for Temporary Restraining Order and Preliminary Injunction by Arizona Employers for Immigration Reform, Inc., Chamber of Commerce of the USA, Arizona Chamber of Commerce, Arizona Hispanic Chamber of Commerce, Inc., Arizona Farm Bureau Federation, Arizona Restaurant and Hospitality Association, Arizona Contractors Association, Inc., Associated Minority Contractors of America, Arizona Roofing Contractors Association, National Roofing Contractors' Association, Wake Up Arizona! Inc., Arizona Landscape Contrac-

DATE	NO.	PROCEEDINGS
		tors Association, Inc. (Attachments: # 1 Exhibit Exbibit A-E to Notice of Filing of Attachments to Legal Brief in Support of Motion for TRO and Preliminary Injunction, # 2 Exhibit Exhibits F-I to Notice of Filing of Attachments to Legal Brief in Support of Motion for TRO and Preliminary Injunction, # 3 Exhibit Exhibit J to Notice of Filing of Attachments to Legal Brief in Support of Motion for TRO and Preliminary Injunction, # 4 Exhibit Exhibit J (cont.) to Notice of Filing of Attachments to Legal Brief in Support of Motion for TRO and Preliminary Injunction, # 5 Exhibit Exhibits K-L to Notice of Filing of Attachments to Legal Brief in Support of Motion for TRO and Preliminary Injunction, # 6 Exhibit Exhibits M-Q to Notice of Filing of Attachments to Legal Brief in Support of Motion for TRO and Preliminary Injunction)(Selden, David) (Entered: 12/16/2007)
12/17/2007	47	NOTICE of Appearance by Daniel S Jurkowitz on behalf of Barbara LaWall (Jurkowitz, Daniel) (Entered: 12/17/2007)
12/17/2007	48	EX PARTE MOTION *Application for Substitution of Counsel (With Client Approval)* by Wake Up Arizona! Inc. (Attachments: # 1 Text of Proposed Order Order Granting Ex Parte Appli-

DATE	NO.	PROCEEDINGS
		cation)(Eckstein, Paul) (Entered: 12/17/2007)
12/17/2007	49	Notice re of Errata by Wake Up Arizona! Inc. (Attachments: # 1 Errata Ex Parte Application for Substitution of Counsel (attaching omitted signed Client Approval page))(Eckstein, Paul) (Entered: 12/17/2007)
12/17/2007	50	OBJECTION re 4 MOTION for Temporary Restraining Order *and Preliminary Injunction* filed by Andrew P Thomas. (GilBride, Eileen) (Entered: 12/17/2007)
12/17/2007	51	OBJECTION re 7 Joint MOTION to Expedite Motion for Expedited Discovery and to Waive Rule 26(d) Joint MOTION to Expedite Motion for Expedited Discovery and to Waive Rule 26(d) Joint MOTION to Expedite Motion for Expedited Discovery and to Waive Rule 26(d) filed by Andrew P Thomas. (GilBride, Eileen) (Entered: 12/17/2007)
12/17/2007	52	SUPPLEMENT of Supplemental Brief in Support of Motion for a Temporary Restraining Order and in Response to the Court's December 13, 2007 Order by Plaintiffs Arizona Employers for Immigration Reform, Inc., Chamber of Commerce of the USA, Arizona Chamber of Commerce, Arizona Hispanic Chamber of Commerce, Inc.,

DATE	NO.	PROCEEDINGS
		Arizona Farm Bureau Federation, Arizona Restaurant and Hospitality Association, Arizona Contractors Association, Inc., Associated Minority Contractors of America, Arizona Roofing Contractors Association, National Roofing Contractors' Association, Arizona Landscape Contractors Association, Inc. (Moffa, Louis) (Entered: 12/17/2007)
12/17/2007	53	RESPONSE to Motion re 4 MOTION for Temporary Restraining Order *and Preliminary Injunction* filed by Criss Candelaria. (Attachments: # 1 Exhibit Transcript excerpt, # 2 Exhibit 2007 E-verify evaluation part 1, # 3 Exhibit 2007 e-verify evaluation part 2, # 4 Exhibit 2007 e-verify evaluation part 3, # 5 Exhibit 2007 e-verify evaluation part 4, # 6 Exhibit E-verify manual, # 7 Exhibit Congressional RS Service, # 8 Exhibit DHS/COmmerce Fact Sheet & Joint statement, # 9 Exhibit Defendants Response)(O'Grady, Mary) (Entered: 12/17/2007)
12/18/2007	54	MOTION for Admission Pro Hac Vice as to attorney Jonathan Weissglass on behalf of plaintiffs Valle Del Sol Inc, Chicanos Por La Causa, Inc., and Somos America. (BAS,) (Entered: 12/18/2007)
12/18/2007		PRO HAC VICE FEE PAID. $ 100, receipt number PHX065826 as to Jo-

DATE	NO.	PROCEEDINGS
		nathan Weissglass. (BAS,) (Entered: 12/18/2007)
12/18/2007	55	ORDER pursuant to General Order 05-25 granting 54 Motion for Admission Pro Hac Vice. Per the Court's Administrative Policies and Procedures Manual, applicant has five (5) days in which to register as a user of the Electronic Filing System. Registration to be accomplished via the court's website at www.azd.uscourts.gov. (BAS,)(This is a TEXT ENTRY ONLY. There is no.pdf document associated with this entry.) (Entered: 12/18/2007)
12/18/2007	56	NOTICE of Appearance by Lance B Payette on behalf of Melvin R Bowers, Jr (Payette, Lance) (Entered: 12/18/2007)
12/18/2007		Notice of request for e-notices by Joel Nomkin. (Nomkin, Joel) (Entered: 12/18/2007)
12/18/2007		Notice of request for e-notices by Charles Blanchard. (Blanchard, Charles) (Entered: 12/18/2007)
12/18/2007		Notice of request for e-notices by Steven Monde. (Monde, Steven) (Entered: 12/18/2007)
12/18/2007	57	RESPONSE to Motion re 4 MOTION for Temporary Restraining Order *and Preliminary Injunction* filed by Terry Goddard, Fidelis V Garcia, Gale Gar-

DATE	NO.	PROCEEDINGS
		riott. (Munns, Christopher) (Entered: 12/18/2007)
12/18/2007	58	Notice re of Supplemental Authority by Terry Goddard, Fidelis V Garcia, Gale Garriott (Attachments: # 1 Exhibit)(Munns, Christopher) (Entered: 12/18/2007)
12/18/2007	59	ORDER granting 48 EX PARTE MOTION for Substitution of Counsel (With Client Approval). Attorney Paul F Eckstein, Joel W Nomkin and Charles A Blanchard for Wake Up Arizona! Inc added. Attorney David A Selden; Heidi Nunn-Gilman and Julie A Pace terminated for Wake Up Arizona! Inc. Signed by Judge Neil V Wake on 12/17/07. (LSP) (Entered: 12/18/2007)
12/18/2007	60	Notice re Notice of Submission of Additional Declarations in Support of Temporary Restraining Order and Application for Preliminary Injunction by Arizona Employers for Immigration Reform, Inc., Chamber of Commerce of the USA, Arizona Chamber of Commerce, Arizona Hispanic Chamber of Commerce, Inc., Arizona Farm Bureau Federation, Arizona Restaurant and Hospitality Association, Arizona Contractors Association, Inc., Associated Minority Contractors of America, Arizona Roofing Contractors Association, National Roofing

DATE	NO.	PROCEEDINGS
		Contractors' Association, Arizona Landscape Contractors Association, Inc. (Attachments: # 1 Exhibit Declarations)(Selden, David) (Entered: 12/18/2007)
12/18/2007	61	REPORT of Business Group Plaintiffs' Report to the Court Regarding Scheduling and Procedural Matters for the December 18, 2007 Hearing by Plaintiffs Arizona Employers for Immigration Reform, Inc., Chamber of Commerce of the USA, Arizona Chamber of Commerce, Arizona Hispanic Chamber of Commerce, Inc., Arizona Farm Bureau Federation, Arizona Restaurant and Hospitality Association, Arizona Contractors Association, Inc., Associated Minority Contractors of America, Arizona Roofing Contractors Association, National Roofing Contractors' Association, Arizona Landscape Contractors Association, Inc. (Selden, David) (Entered: 12/18/2007)
12/18/2007	62	Notice re Notice of Submission of Complete Copy of Levecke Declaration by Arizona Employers for Immigration Reform, Inc., Chamber of Commerce of the USA, Arizona Chamber of Commerce, Arizona Hispanic Chamber of Commerce, Inc., Arizona Farm Bureau Federation, Arizona Restaurant and Hospitality Associa-

DATE	NO.	PROCEEDINGS
		tion, Arizona Contractors Association, Inc., Associated Minority Contractors of America, Arizona Roofing Contractors Association, National Roofing Contractors' Association, Arizona Landscape Contractors Association, Inc. re 60 Other Notice, (Attachments: # 1 Exhibit Declaration of Jason LeVecke)(Selden, David) (Entered: 12/18/2007)
12/18/2007	63	Reply re 50 Objection to Motion for Temporary Restraining Order by Plaintiffs Arizona Employers for Immigration Reform, Inc., Chamber of Commerce of the USA, Arizona Chamber of Commerce, Arizona Hispanic Chamber of Commerce, Inc., Arizona Farm Bureau Federation, Arizona Restaurant and Hospitality Association, Arizona Contractors Association, Inc., Associated Minority Contractors of America, Arizona Roofing Contractors Association, National Roofing Contractors' Association, Arizona Landscape Contractors Association, Inc. (Attachments: # 1 Exhibit Maricopa County Attorney Press Release 12/17/07)(Selden, David) Modified on 12/19/2007, DOCKET TEXT MODIFIED TO CORRECT DOCUMENT LINKAGE, (LSP). (Entered: 12/18/2007)

DATE	NO.	PROCEEDINGS
12/18/2007	64	SUMMONS Returned Executed by Valle Del Sol Inc. Andrew P Thomas served on 12/14/2007; Terry Goddard served on 12/14/2007; Gale Garriott served on 12/14/2007. (Attachments: # 1 Service of Summons on Garriott, # 2 Service of Summons on Goddard)(Weissglass, Jonathan) (Entered: 12/18/2007)
12/18/2007	65	Minute Entry: Proceedings held before Judge Neil V Wake: Motion Hearing held on 12/18/2007 re 4 MOTION for Temporary Restraining Order and Preliminary Injunction and Motions #91 and #94 in CV-07-1355; Scheduling Conference held on 12/18/2007. Discovery due by 1/11/2008. Taking under advisement 4 Motion for TRO and motions #91 and #94 in CV-07-1355. Preliminary Injunction Hearing set for 1/16/2008 09:00 AM before Judge Neil V Wake. Preliminary Injunction Hearing set for 1/17/2008 09:00 AM before Judge Neil V Wake. (Court Reporter Laurie Adams.)(LSP) Modified on 12/21/2007 (LAD). DOCKET TEXT MODIFIED TO REFLECT THAT MOTIONS #7 and #13 ARE NOT UNDER ADVISEMENT. MOTION #4 IN CV-07-2496 AND MOTIONS #91 and #94 IN CV-07-1355 ARE TAKEN UNDER ADVISEMENT. (Entered: 12/19/2007)

DATE	NO.	PROCEEDINGS
12/19/2007	66	TRANSCRIPT DESIGNATION AND ORDER FORM by Arizona Employers for Immigration Reform, Inc., Chamber of Commerce of the USA, Arizona Chamber of Commerce, Arizona Hispanic Chamber of Commerce, Inc., Arizona Farm Bureau Federation, Arizona Restaurant and Hospitality Association, Arizona Contractors Association, Inc., Associated Minority Contractors of America, Arizona Roofing Contractors Association, National Roofing Contractors' Association, Arizona Landscape Contractors Association, Inc. for proceedings held on 12/18/2007 before Judge Wake. (Selden, David) (Entered: 12/19/2007)
12/19/2007	67	TRANSCRIPT DESIGNATION AND ORDER FORM by Valle Del Sol Inc for proceedings held on December 18, 2007 before Judge Neil V. Wake. (Weissglass, Jonathan) (Entered: 12/19/2007)
12/19/2007	68	TRANSCRIPT DESIGNATION AND ORDER FORM by Terry Goddard, Fidelis V Garcia, Gale Garriott for proceedings held on 12/18/2007 before Judge Neil V. Wake. (O'Grady, Mary) (Entered: 12/19/2007)
12/19/2007	69	MOTION for Admission Pro Hac Vice as to attorney Cynthia Valenzuela by Valle Del Sol Inc, Chicanos Por La

DATE	NO.	PROCEEDINGS
		Causa, Inc., Somos America. (Valenzuela, Cynthia) (Entered: 12/19/2007)
12/19/2007		Notice of request for e-notices by Taylor Young. (Young, Taylor) (Entered: 12/19/2007)
12/20/2007		PRO HAC VICE FEE PAID. $ 100, receipt number PHX065964 as to Cynthia Ann Valenzuela. (BAS,) (Entered: 12/20/2007)
12/20/2007	70	ORDER pursuant to General Order 05-25 granting 69 Motion for Admission Pro Hac Vice. Per the Court's Administrative Policies and Procedures Manual, applicant has five (5) days in which to register as a user of the Electronic Filing System. Registration to be accomplished via the court's website at www.azd.uscourts.gov. (BAS,) (This is a TEXT ENTRY ONLY. There is no.pdf document associated with this entry.) (Entered: 12/20/2007)
12/20/2007	71	Notice re of Submission of Corrected Brandt Declaration by Arizona Employers for Immigration Reform, Inc., Chamber of Commerce of the USA, Arizona Chamber of Commerce, Arizona Hispanic Chamber of Commerce, Inc., Arizona Farm Bureau Federation, Arizona Restaurant and Hospitality Association, Arizona Contractors Association, Inc., Associated Minority Contractors of America, Arizo-

DATE	NO.	PROCEEDINGS
		na Roofing Contractors Association, National Roofing Contractors' Association, Arizona Landscape Contractors Association, Inc. (Selden, David) (Entered: 12/20/2007)
12/21/2007	72	TRANSCRIPT DESIGNATION AND ORDER FORM by Andrew P Thomas for proceedings held on 12/18/07 before Judge Neil Wake. (GilBride, Eileen) (Entered: 12/21/2007)
12/21/2007		Notice of request for e-notices by Catherine O'Grady with the Office of the Attorney General. (O'Grady, Catherine) (Entered: 12/21/2007)
12/21/2007	73	MOTION for Admission Pro Hac Vice as to attorney Omar C Jadwat on behalf of plaintiffs Valle Del Sol Inc, Chicanos Por La Causa, Inc., and Somos America. (BAS,) (Entered: 12/21/2007)
12/21/2007		PRO HAC VICE FEE PAID. $ 100, receipt number PHX066017 as to Omar C Jadwat. (BAS,) (Entered: 12/21/2007)
12/21/2007	74	ORDER pursuant to General Order 05-25 granting 73 Motion for Admission Pro Hac Vice. Per the Court's Administrative Policies and Procedures Manual, applicant has five (5) days in which to register as a user of the Electronic Filing System. Registration to be accomplished via the court's web-

DATE	NO.	PROCEEDINGS
		site at www.azd.uscourts.gov. (BAS,) (This is a TEXT ENTRY ONLY. There is no.pdf document associated with this entry.) (Entered: 12/21/2007)
12/21/2007	75	ORDER Plaintiffs' 4 MOTION for Temporary Restraining Order and Plaintiffs' Application for Temporary Restraining Order (3 in (CV 07-2518, now conslidated with CV 07-2496) is denied. This order does not dispose of the motions for preliminary injunction, which are set for hearing on January 16, 2007. Signed by Judge Neil V Wake on 12/21/07. (Attachments: # 1 Exhibit)(LSP) (Entered: 12/21/2007)
12/21/2007	76	DECLARATION *of Marioin "Mac" Magruder* by Plaintiff Wake Up Arizona! Inc. (Eckstein, Paul) (Entered: 12/21/2007)
12/21/2007	77	Notice re of Filing Declaration of Marion "Mac" Magruder by Wake Up Arizona! Inc. re 76 Declaration (Eckstein, Paul) (Entered: 12/21/2007)
12/21/2007	78	RESPONSE in Opposition re 13 MOTION for Protective Order *Regarding John Doe Members* filed by Criss Candelaria. (O'Grady, Mary) (Entered: 12/21/2007)
12/24/2007	79	Notice re of Submission of Declaration and Report of Judith K. Gans by Arizona Employers for Immigration

DATE	NO.	PROCEEDINGS
		Reform, Inc., Chamber of Commerce of the USA, Arizona Chamber of Commerce, Arizona Hispanic Chamber of Commerce, Inc., Arizona Farm Bureau Federation, Arizona Restaurant and Hospitality Association, Arizona Contractors Association, Inc., Associated Minority Contractors of America, Arizona Roofing Contractors Association, National Roofing Contractors' Association, Arizona Landscape Contractors Association, Inc. (Attachments: # 1 Exhibit Declaration of Judith K. Gans, # 2 Exhibit Judith Gans CV, # 3 Exhibit Exhibit 3-1 - Report entitled "Immigrants in Arizona: Fiscal and Economic Impacts", # 4 Exhibit Exhibit 3-2 - Report entitled "Immigrants in Arizona: Fiscal and Economic Impacts", # 5 Exhibit Exhibit 3-3 - Report entitled "Immigrants in Arizona: Fiscal and Economic Impacts", # 6 Exhibit Exhibit 3-4 - Report entitled "Immigrants in Arizona: Fiscal and Economic Impacts", # 7 Exhibit Exhibit 3-5 - Report entitled "Immigrants in Arizona: Fiscal and Economic Impacts", # 8 Exhibit Exhibit 3-6 - Report entitled "Immigrants in Arizona: Fiscal and Economic Impacts", # 9 Exhibit Exhibit 3-7 - Report entitled "Immigrants in Arizona: Fiscal and Economic Impacts") (Selden, David) (Entered: 12/24/2007)

DATE	NO.	PROCEEDINGS
12/24/2007	80	Notice re Notice of Expert Witness Designation of Marc R. Rosenblum, Ph.D. by Arizona Employers for Immigration Reform, Inc., Chamber of Commerce of the USA, Arizona Chamber of Commerce, Arizona Hispanic Chamber of Commerce, Inc., Arizona Farm Bureau Federation, Arizona Restaurant and Hospitality Association, Arizona Contractors Association, Inc., Associated Minority Contractors of America, Arizona Roofing Contractors Association, National Roofing Contractors' Association, Arizona Landscape Contractors Association, Inc. (Attachments: # 1 Exhibit Exhibit 1 - Dr. Rosenblum CV, # 2 Exhibit Report of Dr. Rosenblum, # 3 Exhibit Testimony of Dr. Rosenblum) (Selden, David) (Entered: 12/24/2007)
12/24/2007	81	Notice re Notice of Submission of Westat Report and Declaration of Heidi Nunn-Gilman by Arizona Employers for Immigration Reform, Inc., Chamber of Commerce of the USA, Arizona Chamber of Commerce, Arizona Hispanic Chamber of Commerce, Inc., Arizona Farm Bureau Federation, Arizona Restaurant and Hospitality Association, Arizona Contractors Association, Inc., Associated Minority Contractors of America, Arizona Roofing Contractors Association, National Roofing Contractors' Association, Ari-

DATE	NO.	PROCEEDINGS
		zona Landscape Contractors Association, Inc. (Attachments: # 1 Exhibit Declaration of Heidi Nunn-Gilman, # 2 Exhibit Exhibit 2-1 (Westat Report), # 3 Exhibit Exhibit 2-2 (Westat Report), # 4 Exhibit Exhibit 2-3 (Westat Report), # 5 Exhibit Exhibit 2-4 (Westat Report), # 6 Exhibit Exhibit 2-5 (Westat Report), # 7 Exhibit Exhibit 2-6 (Westat Report), # 8 Exhibit Exhibit 2-7 (Westat Report), # 9 Exhibit Exhibit 2-8 (Westat Report), # 10 Exhibit Exhibit 2-9 (Westat Report)) (Selden, David) (Entered: 12/24/2007)
12/26/2007	82	MOTION for Admission Pro Hac Vice as to attorney Jennifer C Chang on behalf of the plaintiffs. (BAS,) (Entered: 12/26/2007)
12/26/2007	83	MOTION for Admission Pro Hac Vice as to attorney Lucas Guttentag on behalf of the plaintiffs. (BAS,) (Entered: 12/26/2007)
12/26/2007		PRO HAC VICE FEE PAID. $ 200, receipt number PHX066059 as to Jennifer C Chang, Lucas Guttentag. (BAS,) (Entered: 12/26/2007)
12/26/2007	84	ORDER pursuant to General Order 05-25 granting 82 Motion for Admission Pro Hac Vice; granting 83 Motion for Admission Pro Hac Vice. Per the Court's Administrative Policies and Procedures Manual, applicant has five

DATE	NO.	PROCEEDINGS
		(5) days in which to register as a user of the Electronic Filing System. Registration to be accomplished via the court's website at www.azd.uscourts.gov. (BAS,)(This is a TEXT ENTRY ONLY. There is no pdf document associated with this entry.) (Entered: 12/26/2007)
12/26/2007	85	MOTION to Strike re Notice of Expert Designation re Rosenblum by Andrew P Thomas. (GilBride, Eileen) (Entered: 12/26/2007)
12/27/2007		Notice of request for e-notices by Jennifer A. Baker. (Baker, Jennifer) (Entered: 12/27/2007)
12/27/2007		Notice of request for e-notices by Mary Jo Foster, with the Office of the Attorney General. (Foster, Mary) (Entered: 12/27/2007)
12/27/2007	86	NOTICE of Appearance by Roger William Hall on behalf of Criss Candelaria, Ed Rheinheimer, Kenny Angle, Derek D Rapier, Martin Brannan, Matthew J Smith, James Currier, George Silva, Sheila Polk (Hall, Roger) (Entered: 12/27/2007)
12/28/2007	87	NOTICE of Appearance by Roger William Hall on behalf of Daisy Flores (Hall, Roger) (Entered: 12/28/2007)
12/28/2007	88	Joinder re 78 Response in Opposition to Motion for *Protective Order (Re*

DATE	NO.	PROCEEDINGS
		John Doe Affidavits) by Defendant Andrew P Thomas filed by Andrew P Thomas. (GilBride, Eileen) (Entered: 12/28/2007)
12/28/2007	89	Notice re Defendants' Notice of Willingness to Stipulate to Undisputed Facts by Terry Goddard, Fidelis V Garcia, Gale Garriott (Munns, Christopher) (Entered: 12/28/2007)
12/28/2007	90	NOTICE of Appearance by Roger William Hall on behalf of Melvin R Bowers, Jr (Hall, Roger) (Entered: 12/28/2007)
12/28/2007	91	Notice re Business Group Plaintiffs' Supplementation of Notice of Expert Witness Designation of Marc Rosenblum by Arizona Employers for Immigration Reform, Inc., Chamber of Commerce of the USA, Arizona Chamber of Commerce, Arizona Hispanic Chamber of Commerce, Inc., Arizona Farm Bureau Federation, Arizona Restaurant and Hospitality Association, Arizona Contractors Association, Inc., Associated Minority Contractors of America, Arizona Roofing Contractors Association, National Roofing Contractors' Association, Arizona Landscape Contractors Association, Inc. re 80 Other Notice, (Selden, David) (Entered: 12/28/2007)

DATE	NO.	PROCEEDINGS
12/28/2007	92	RESPONSE in Opposition re 85 MOTION to Strike re Notice of Expert Designation re Rosenblum filed by Arizona Employers for Immigration Reform, Inc., Chamber of Commerce of the USA, Arizona Chamber of Commerce, Arizona Hispanic Chamber of Commerce, Inc., Arizona Farm Bureau Federation, Arizona Restaurant and Hospitality Association, Arizona Contractors Association, Inc., Associated Minority Contractors of America, Arizona Roofing Contractors Association, National Roofing Contractors' Association, Arizona Landscape Contractors Association, Inc. (Selden, David) (Entered: 12/28/2007)
12/31/2007	93	REPLY in Support re 85 MOTION to Strike re Notice of Expert Designation re Rosenblum filed by Andrew P Thomas. (Attachments: # 1 Exhibit A and B)(GilBride, Eileen) (Entered: 12/31/2007)
12/31/2007	94	MOTION to Expedite Ruling on Motion to Strike by Andrew P Thomas. (GilBride, Eileen) (Entered: 12/31/2007)
12/31/2007	95	OBJECTION re 91 Other Notice, *to Plaintiffs' Supplementation of Rosenblum Designation* by Defendant Andrew P Thomas. (GilBride, Eileen) (Entered: 12/31/2007)

DATE	NO.	PROCEEDINGS
12/31/2007	96	STIPULATION *Regarding Scheduling and Case Management Deadlines and Details* by Arizona Employers for Immigration Reform, Inc., Chamber of Commerce of the USA, Arizona Chamber of Commerce, Arizona Hispanic Chamber of Commerce, Inc., Arizona Farm Bureau Federation, Arizona Restaurant and Hospitality Association, Arizona Contractors Association, Inc., Associated Minority Contractors of America, Arizona Roofing Contractors Association, National Roofing Contractors' Association, Arizona Landscape Contractors Association, Inc. (Selden, David) (Entered: 12/31/2007)
01/02/2008	97	MOTION for Admission Pro Hac Vice as to attorney Robin S Conrad on behalf of Chamber of Commerce of the USA. (BAS,) (Entered: 01/03/2008)
01/02/2008	124	TRANSCRIPT of Proceedings re: Motion Hearing and Scheduling Conference re Preliminary Injunction held on 12/18/07 before Judge Neil V Wake. Court Reporter: Laurie A Adams. Transcript may be viewed at the court public terminal or purchased through the Court Reporter/Transcriber before the deadline for Release of Transcript Restriction. After that date it may be obtained through PACER. Redaction Request due 1/23/2008. Redacted

DATE	NO.	PROCEEDINGS
		Transcript Deadline set for 2/4/2008. Release of Transcript Restriction set for 4/1/2008. (BAS,) (Entered: 01/10/2008)
01/03/2008		PRO HAC VICE FEE PAID. $ 100, receipt number PHX066205 as to Robin S Conrad. (BAS,) (Entered: 01/03/2008)
01/03/2008	98	ORDER pursuant to General Order 05-25 granting 97 Motion for Admission Pro Hac Vice. Per the Court's Administrative Policies and Procedures Manual, applicant has five (5) days in which to register as a user of the Electronic Filing System. Registration to be accomplished via the court's website at www.azd.uscourts.gov. (BAS,) (This is a TEXT ENTRY ONLY. There is no.pdf document associated with this entry.) (Entered: 01/03/2008)
01/03/2008	99	REPLY in Support re 13 MOTION for Protective Order *Regarding John Doe Members* filed by Arizona Employers for Immigration Reform, Inc., Chamber of Commerce of the USA, Arizona Chamber of Commerce, Arizona Hispanic Chamber of Commerce, Inc., Arizona Farm Bureau Federation, Arizona Restaurant and Hospitality Association, Arizona Contractors Association, Inc., Associated Minority Contractors of America, Arizona Roofing Contractors Association, National

DATE	NO.	PROCEEDINGS
		Roofing Contractors' Association, Arizona Landscape Contractors Association, Inc. (Attachments: # 1 Exhibit Exhibits A and B to Reply re Motion for Protective Order)(Selden, David) (Entered: 01/03/2008)
01/04/2008	100	ORDER denying 85 Dft Thomas' Motion to Strike Plaintiff's Expert Designation of Marc Rosenblum and 95 Objection to Plaintiff's "Supplementation" of Rosenblum Designation. Granting 94 Motion to Expedite Ruling. Paragraph 1 of 96 Stipulation, which would extend the time for Dfts to file responsive pleading to 2/15/08 is denied, Dfts time to answer is extended to 1/11/08. Paragraph 2 of 96 Stipulation, which withdraws certain discovery requests, is accepted on the assumption that Mr. Hall joins in it. The Parties shall Report to the court by 1/11/2008, an agreed schedule, or separate schedules if they cannot agree, for bringing this case to final trial on the merits as quickly as possible, bearing in mind that evidence presented at the preliminary injunction hearing need not be repeated. Motion Hearing on Plaintiff's Motions for Preliminary Injunction is continued to 1/16/08 at 1:30. Granting 7 Plaintiffs' Motion to Expedite Discovery. Signed by Judge Neil V Wake on 1/4/08.(LSP) (Entered: 01/04/2008)

DATE	NO.	PROCEEDINGS
01/04/2008	101	MOTION for Admission Pro Hac Vice as to attorney Stephen P Berzon on behalf of plaintiffs Valle Del Sol Inc, Chicanos Por La Causa, Inc., and Somos America. (BAS,) (Entered: 01/04/2008)
01/04/2008	102	MOTION for Admission Pro Hac Vice as to attorney Rebecca Smullin on behalf of Valle Del Sol Inc, Chicanos Por La Causa, Inc., and Somos America. (BAS,) (Entered: 01/04/2008)
01/04/2008		PRO HAC VICE FEE PAID. $ 100, receipt number PHX066308 as to Stephen Paul Berzon. (BAS,) (Entered: 01/04/2008)
01/04/2008		PRO HAC VICE FEE PAID. $ 100, receipt number PHX066307 as to Rebecca Smullin. (BAS,) (Entered: 01/04/2008)
01/04/2008	103	ORDER pursuant to General Order 05-25 granting 101 Motion for Admission Pro Hac Vice; granting 102 Motion for Admission Pro Hac Vice. Per the Court's Administrative Policies and Procedures Manual, applicant has five (5) days in which to register as a user of the Electronic Filing System. Registration to be accomplished via the court's website at www.azd.uscourts.gov. (BAS,)(This is a TEXT ENTRY ONLY. There is no.pdf docu-

DATE	NO.	PROCEEDINGS
		ment associated with this entry.) (Entered: 01/04/2008)
01/04/2008	104	MOTION for Admission Pro Hac Vice as to attorney Linton Joaquin *on behalf of plaintiffs* by Valle Del Sol Inc. (Attachments: # 1 Text of Proposed Order Order for Admission Pro Hac Vice)(Joaquin, Linton) (Entered: 01/04/2008)
01/04/2008	105	MOTION for Admission Pro Hac Vice as to attorney Karen C. Tumlin *on behalf of plaintiffs* by Valle Del Sol Inc. (Attachments: # 1 Text of Proposed Order Proposed Order Admission Pro Hac Vice)(Tumlin, Karen) (Entered: 01/04/2008)
01/04/2008	106	STIPULATION by Arizona Employers for Immigration Reform, Inc., Chamber of Commerce of the USA, Arizona Chamber of Commerce, Arizona Hispanic Chamber of Commerce, Inc., Arizona Farm Bureau Federation, Arizona Restaurant and Hospitality Association, Arizona Contractors Association, Inc., Associated Minority Contractors of America, Arizona Roofing Contractors Association, National Roofing Contractors' Association, Arizona Landscape Contractors Association, Inc. (Selden, David) (Entered: 01/04/2008)

DATE	NO.	PROCEEDINGS
01/07/2008	107	RESPONSE to Motion re 4 MOTION for Temporary Restraining Order *and Preliminary Injunction* filed by Andrew P Thomas. (Attachments: # 1 Exhibit A to Thomas' Response to Motion for Preliminary Injunction, # 2 Exhibit B to Thomas' Response to Motion for Preliminary Injunction, # 3 Exhibit C & D to Thomas' Response to Motion for Preliminary Injunction) (GilBride, Eileen) (Entered: 01/07/2008)
01/07/2008	108	AFFIDAVIT of George Borjas re 107 Response to Motion, *in Support of Response to Motion for Preliminary Injunction* by Defendant Andrew P Thomas. (Attachments: # 1 Appendix A, B & C)(GilBride, Eileen) (Entered: 01/07/2008)
01/07/2008	109	MOTION for Leave to File Excess Pages. Filed by Terry Goddard. (O'Grady, Mary) Modified on 1/8/2008, INCORRECT EVENT TYPE SELECTED. THIS ENTRY HAS BEEN MODIFIED FROM "Lodged Proposed" TO "Motion", (LSP). (Entered: 01/07/2008)
01/07/2008	110	RESPONSE re 13 MOTION for Protective Order *Regarding John Doe Members Response to the Court's Question Regarding Motion for Protective Order Regarding John Doe Declarations* filed by Arizona Employers for Immigration Reform, Inc.,

DATE	NO.	PROCEEDINGS
		Chamber of Commerce of the USA, Arizona Chamber of Commerce, Arizona Hispanic Chamber of Commerce, Inc., Arizona Farm Bureau Federation, Arizona Restaurant and Hospitality Association, Arizona Contractors Association, Inc., Associated Minority Contractors of America, Arizona Roofing Contractors Association, National Roofing Contractors' Association, Arizona Landscape Contractors Association, Inc. (Selden, David) (Entered: 01/07/2008)
01/07/2008	111	ADDITIONAL ATTACHMENT Proposed Order Granting re 109 Defendants' Motion to Exceed Page Limit. Filed by Terry Goddard. (O'Grady, Mary) Modified on 1/8/2008, INCORRECT EVENT SELECTED. THIS ENTRY WAS BEEN MODIFIED FROM "Lodged Proposed" TO "Additional Attachments", (LSP). (Entered: 01/07/2008)
01/07/2008	112	RESPONSE to Motion re 4 MOTION for Temporary Restraining Order *and Preliminary Injunction* filed by Terry Goddard. (Attachments: # 1 Exhibit Exhibit 1 & 2, # 2 Exhibit Exhibit 3, Part A, # 3 Exhibit Exhibit 3, Part B, # 4 Exhibit Exhibit 3, Part C, # 5 Exhibit Exhibit 3, Part D)(O'Grady, Mary) (Entered: 01/07/2008)

DATE	NO.	PROCEEDINGS
01/08/2008	113	Joinder *of Defendant James P. Walsh, Pinal County Attorney, to State 112 Defendants' Response to Motion for Preliminary Injunctions* by Defendant James P Walsh. (Roll, Chris) Modified on 1/9/2008, DOCKET TEXT MODIFIED TO CORRECT DOCUMENT LINKAGE, (LSP). (Entered: 01/08/2008)
01/08/2008	114	Notice re Notice Regarding Mootness of Plaintiffs Motion for Protective Order by Terry Goddard (O'Grady, Mary) (Entered: 01/08/2008)
01/08/2008	115	Joinder re 114 Other Notice *by State re Position on Mootness of PLs' Motion for Protective Order* by Defendant Andrew P Thomas. (GilBride, Eileen) (Entered: 01/08/2008)
01/08/2008		PRO HAC VICE FEE PAID. $ 200, receipt number PHX066310 as to Linton Joaquin, Karen Cassandra Tumlin. (BAS,) (Entered: 01/08/2008)
01/08/2008	116	ORDER pursuant to General Order 05-25 granting 104 Motion for Admission Pro Hac Vice; granting 105 Motion for Admission Pro Hac Vice. Per the Court's Administrative Policies and Procedures Manual, applicant has five (5) days in which to register as a user of the Electronic Filing System. Registration to be accomplished via the court's website at www.

DATE	NO.	PROCEEDINGS
		azd.uscourts.gov. (BAS,)(This is a TEXT ENTRY ONLY. There is no.pdf document associated with this entry.) (Entered: 01/08/2008)
01/08/2008	117	MOTION for Admission Pro Hac Vice as to attorney Monica T. Guizar by Valle Del Sol Inc. (Attachments: # 1 Text of Proposed Order)(Guizar, Monica) Modified on 1/9/2008, DOCUMENT FILED WITH INCORRECT CASE NUMBER, (LSP). (Entered: 01/08/2008)
01/08/2008	118	Joinder *in 112 Defendants' Response to Motions for Preliminary Injunction* by Defendant Barbara LaWall filed by Barbara LaWall. (Jurkowitz, Daniel) Modified on 1/9/2008, DOCKET TEXT MODIFIED TO CORRECT DOCUMENT LINKAGE, (LSP). (Entered: 01/08/2008)
01/08/2008	119	Joinder re 112 Response to Motion, 107 Response to Motion, *Statement of Position* by Defendants Criss Candelaria, Ed Rheinheimer, Daisy Flores, Kenny Angle, Derek D Rapier, Martin Brannan, Matthew J Smith, George Silva, Sheila Polk, Melvin R Bowers, Jr filed by Criss Candelaria, Ed Rheinheimer, Daisy Flores, Kenny Angle, Derek D Rapier, Martin Brannan, Matthew J Smith, George Silva, Sheila Polk, Melvin R Bowers, Jr. (Hall, Roger) (Entered: 01/08/2008)

DATE	NO.	PROCEEDINGS
01/08/2008	120	Joinder re 114 Other Notice, 78 Response in Opposition to Motion by Defendant Sheila Polk filed by Sheila Polk. (Hall, Roger) (Entered: 01/08/2008)
01/08/2008		PRO HAC VICE FEE PAID. $ 100, receipt number PHX066310 as to Monica Teresa Guizar. (BAS,) (Entered: 01/08/2008)
01/08/2008	121	ORDER pursuant to General Order 05-25 granting 117 Motion for Admission Pro Hac Vice. Per the Court's Administrative Policies and Procedures Manual, applicant has five (5) days in which to register as a user of the Electronic Filing System. Registration to be accomplished via the court's website at www.azd.uscourts.gov. (BAS,)(This is a TEXT ENTRY ONLY. There is no.pdf document associated with this entry.) (Entered: 01/08/2008)
01/09/2008		Remark as to attorney Shane Brennan Labor & Employment Counsel National Chamber Litigation Center Inc 1615 H St NW Washington DC 20062 removed from database per attorney request; party represented by other admitted counsel. (BAS,) (Entered: 01/09/2008)
01/09/2008	122	Joinder *of Defendant Terence C. Hance, Coconino County Attorney, to*

DATE	NO.	PROCEEDINGS
		State Defendants' Response to Motions for Preliminary Injunctions by Defendant Terence C Haner filed by Terence C Haner. (Lessler, Michael) (Entered: 01/09/2008)
01/10/2008	123	AFFIDAVIT of George Borjas re 107 Response to Motion, *(Supplemental Affidavit) in Support of Response to Plaintiffs' Motion for Preliminary Injunction* by Defendant Andrew P Thomas. (GilBride, Eileen) (Entered: 01/10/2008)
01/10/2008	125	NOTICE OF FILING OF OFFICIAL TRANSCRIPT (BAS,) (Entered: 01/10/2008)
01/10/2008	126	ORDER granting 109 Motion for Leave to File Excess Pages; State Defendants' Response to Motions for Preliminary Injunction 112 shall be deemed filed 1/7/08. Signed by Judge Neil V Wake on 1/10/08.(LSP) (Entered: 01/10/2008)
01/10/2008	127	Notice re Notice of Filing of Additional Evidence in Support of Reply by Arizona Employers for Immigration Reform, Inc., Chamber of Commerce of the USA, Arizona Chamber of Commerce, Arizona Hispanic Chamber of Commerce, Inc., Arizona Farm Bureau Federation, Arizona Restaurant and Hospitality Association, Arizona Contractors Association, Inc.,

DATE	NO.	PROCEEDINGS
		Associated Minority Contractors of America, Arizona Roofing Contractors Association, National Roofing Contractors' Association, Arizona Landscape Contractors Association, Inc. (Attachments: # 1 Exhibit Exhibits 1-6 to Notice of Filing of Additional Evidence in Support of Reply)(Selden, David) (Entered: 01/10/2008)
01/10/2008	128	REPLY in Support re 4 MOTION for Temporary Restraining Order *and Preliminary Injunction* filed by Valle Del Sol Inc. (Weissglass, Jonathan) (Entered: 01/10/2008)
01/10/2008	129	MOTION for Leave to File Excess Pages for Motion to Exceed Page Limit Regarding Reply in Support of Motion for Preliminary Injunction and Judgment on the Merits by Arizona Employers for Immigration Reform, Inc., Chamber of Commerce of the USA, Arizona Chamber of Commerce, Arizona Hispanic Chamber of Commerce, Inc., Arizona Farm Bureau Federation, Arizona Restaurant and Hospitality Association, Arizona Contractors Association, Inc., Associated Minority Contractors of America, Arizona Roofing Contractors Association, National Roofing Contractors' Association, Arizona Landscape Contractors Association, Inc. (Selden, David) (Entered: 01/10/2008)

DATE	NO.	PROCEEDINGS
01/10/2008	130	LODGED Proposed Reply in Support of Motion for Preliminary Injunction and Judgment on the Merits re: 129 MOTION for Leave to File Excess Pages for Motion to Exceed Page Limit Regarding Reply in Support of Motion for Preliminary Injunction and Judgment on the Merits. Document to be filed by Clerk if Motion to Leave to File or Amend is granted. Filed by Arizona Employers for Immigration Reform, Inc., Chamber of Commerce of the USA, Arizona Chamber of Commerce, Arizona Hispanic Chamber of Commerce, Inc., Arizona Farm Bureau Federation, Arizona Restaurant and Hospitality Association, Arizona Contractors Association, Inc. Associated Minority Contractors of America, Arizona Roofing Contractors Association, National Roofing Contractors' Association, Arizona Landscape Contractors Association, Inc. (Selden, David) Modified on 1/11/2008, COVER SHEET IS MISSING, ATTORNEY NOTICED, (LSP). (Entered: 01/10/2008)
01/10/2008	131	MOTION for Leave to File Excess Pages for Reply in Support of Motion for Preliminary Injunction by Wake Up Arizona! Inc. (Attachments: # 1 Text of Proposed Order)(Blanchard, Charles) (Entered: 01/10/2008)

DATE	NO.	PROCEEDINGS
01/10/2008	132	LODGED Proposed Reply in Support of Motion for Preliminary Injunction. Document to be filed by Clerk if Motion to Leave to File or Amend is granted. Filed by Wake Up Arizona! Inc. (Blanchard, Charles) Modified on 1/11/2008, COVER SHEET IS MISSING, ATTORNEY NOTICED, (LSP). (Entered: 01/10/2008)
01/10/2008	133	Notice re Second Notice of Filing of Additional Evidence in Support of Reply by Arizona Employers for Immigration Reform, Inc., Chamber of Commerce of the USA, Arizona Chamber of Commerce, Arizona Hispanic Chamber of Commerce, Inc., Arizona Farm Bureau Federation, Arizona Restaurant and Hospitality Association, Arizona Contractors Association, Inc., Associated Minority Contractors of America, Arizona Roofing Contractors Association, National Roofing Contractors' Association, Arizona Landscape Contractors Association, Inc. (Attachments: # 1 Exhibit Exhibits 1-3 to Second Notice of Filing of Additional Evidence in Support of Reply)(Selden, David) (Entered: 01/10/2008)
01/10/2008	144	REPLY to Response to Motion in Support of 4 MOTION for Temporary Restraining Order *and Preliminary Injunction* filed by Arizona Employers

DATE	NO.	PROCEEDINGS
		for Immigration Reform, Inc., Chamber of Commerce of the USA, Arizona Chamber of Commerce, Arizona Hispanic Chamber of Commerce, Inc., Arizona Farm Bureau Federation, Arizona Restaurant and Hospitality Association, Arizona Contractors Association, Inc., Associated Minority Contractors of America, Arizona Roofing Contractors Association, National Roofing Contractors' Association, Arizona Landscape Contractors Association, Inc. (SAT) (Entered: 01/11/2008)
01/10/2008	146	REPLY to Response to Motion in Support of 4 MOTION for Temporary Restraining Order *and Preliminary Injunction* filed by Wake Up Arizona! Inc. (SAT) (Entered: 01/11/2008)
01/11/2008	134	STIPULATION *re Consolidation* by Arizona Employers for Immigration Reform, Inc., Chamber of Commerce of the USA, Arizona Chamber of Commerce, Arizona Hispanic Chamber of Commerce, Inc., Arizona Farm Bureau Federation, Arizona Restaurant and Hospitality Association, Arizona Contractors Association, Inc., Associated Minority Contractors of America, Arizona Roofing Contractors Association, National Roofing Contractors' Association, Arizona Landscape Contractors Association, Inc. (Pace, Julie) (Entered: 01/11/2008)

DATE	NO.	PROCEEDINGS.
01/11/2008	135	ANSWER to Complaint of *ARIZONA CONTRACTORS INC., ET. AL.* by Jon Smith.(Kerekes, William) (Entered: 01/11/2008)
01/11/2008	136	*Separate* ANSWER to 1 Complaint *in CIV07-2496* by Andrew P Thomas. (GilBride, Eileen) (Entered: 01/11/2008)
01/11/2008	137	ANSWER to 1 Complaint by Criss Candelaria, Ed Rheinheimer, Daisy Flores, Kenny Angle, Derek D Rapier, Martin Brannan, Matthew J Smith, George Silva, Sheila Polk, Melvin R Bowers, Jr.(Hall, Roger) (Entered: 01/11/2008)
01/11/2008	138	Notice re Notice of Filing Separate Answer by Andrew P. Thomas to Complaint filed by Valle del Sol by Andrew P Thomas (GilBride, Eileen) (Entered: 01/11/2008)
01/11/2008	139	ANSWER to 1 Complaint *of Arizona Contractors Inc, et. al* by James P Walsh.(Roll, Chris) (Entered: 01/11/2008)
01/11/2008	140	ANSWER to 1 Complaint of *AZ Contractors Inc. et al.* by Terry Goddard.(O'Grady, Mary) (Entered: 01/11/2008)
01/11/2008	141	*JOINDER AND* ANSWER to Complaint *by Arizona Contractors et al by*

DATE	NO.	PROCEEDINGS
		Barbara LaWall.(Jurkowitz, Daniel) (Entered: 01/11/2008)
01/11/2008	142	ORDER - IT IS ORDERED that Plaintiffs' 129 Motion to Exceed Page Limit Regarding Reply in support of Motion for Preliminary Injunction and Judgment on the Merits is granted, and Plaintiffs' Reply in Support of Motion for Preliminary Injunction and Judgment on the Merits (lodged at doc. # 130) shall be deemed filed January 10, 2008. Signed by Judge Neil V Wake on 1/11/08.(SAT) (Entered: 01/11/2008)
01/11/2008	143	ANSWER to 1 Complaint *of Valle Del Sol, Inc. et al.* by Terry Goddard. (O'Grady, Mary) (Entered: 01/11/2008)
01/11/2008	145	ORDER - Upon consideration of Plaintiff Wake Up Arizona! Inc.'s 131 Motion to Exceed Page Limit, IT IS HEREBY ORDERED that the Motion is granted, and Wake Up Arizona! Inc.s Reply in Support of Motion for Preliminary Injunction (lodged at doc. # 132) shall be deemed filed January 10, 2008. Signed by Judge Neil V Wake on 1/11/08.(SAT), (Entered: 01/11/2008)
01/11/2008	147	ORDER - IT IS THEREFORE ORDERED that Defendants may file surreply briefs to Plaintiff's reply briefs by January 16, 2008. Signed by Judge

DATE	NO.	PROCEEDINGS
		Neil V Wake on 1/11/08. (SAT) (Entered: 01/11/2008)
01/11/2008	148	STATEMENT of Statement of Joint Stipulated Facts by Plaintiffs Arizona Employers for Immigration Reform, Inc., Chamber of Commerce of the USA, Arizona Chamber of Commerce, Arizona Hispanic Chamber of Commerce, Inc., Arizona Farm Bureau Federation, Arizona Restaurant and Hospitality Association, Arizona Contractors Association, Inc., Associated Minority Contractors of America, Arizona Roofing Contractors Association, National Roofing Contractors' Association, Arizona Landscape Contractors Association, Inc. (Attachments: # 1 Exhibit Exhibits 1-7, # 2 Exhibit Exhibit 8 (part 1), # 3 Exhibit Exhibit 8 (part 2), # 4 Exhibit Exhibit 9, # 5 Exhibit Exhibit 10 (part 1), # 6 Exhibit Exhibit 10 (part 2))(Selden, David) (Entered: 01/11/2008)
01/11/2008	149	Additional Attachments to Main Document re 148 Statement, *Exhibits 11-22 (part 4) to Statement of Stipulated Facts* by Plaintiffs Arizona Employers for Immigration Reform, Inc., Chamber of Commerce of the USA, Arizona Chamber of Commerce, Arizona Hispanic Chamber of Commerce, Inc., Arizona Farm Bureau Federation, Arizona Restaurant and Hospitality

DATE	NO.	PROCEEDINGS
		Association, Arizona Contractors Association, Inc., Associated Minority Contractors of America, Arizona Roofing Contractors Association, National Roofing Contractors' Association, Arizona Landscape Contractors Association, Inc. (Attachments: # 1 Exhibit Exhibit 13, # 2 Exhibit Exhibit 14, # 3 Exhibit Exhibits 15-16, # 4 Exhibit Exhibit 17-18, # 5 Exhibit Exhibits 19 - 22 (part 1), # 6 Exhibit Exhibit 22 (part 2), # 7 Exhibit Exhibit 22 (part 3), # 8 Exhibit Exhibit 22 (part 4))(Selden, David) (Entered: 01/11/2008)
01/11/2008	150	Additional Attachments to Main Document re 148 Statement, *Exhibits 23-44* by Plaintiffs Arizona Employers for Immigration Reform, Inc., Chamber of Commerce of the USA, Arizona Chamber of Commerce, Arizona Hispanic Chamber of Commerce, Inc., Arizona Farm Bureau Federation, Arizona Restaurant and Hospitality Association, Arizona Contractors Association, Inc., Associated Minority Contractors of America, Arizona Roofing Contractors Association, National Roofing Contractors' Association, Arizona Landscape Contractors Association, Inc. (Attachments: # 1 Exhibit Exhibit 25 (part 1), # 2 Exhibit Exhibit 25 (part 2), # 3 Exhibit Exhibits 26-34, # 4 Exhibit Exhibit 35 (part 1),

DATE	NO.	PROCEEDINGS
		# 5 Exhibit Exhibit 35 (part 2), # 6 Exhibit Exhibit 35 (part 3), # 7 Exhibit Exhibit 35 (part 4), # 8 Exhibit Exhibit 36, # 9 Exhibit Exhibit 37, # 10 Exhibit Exhibit 38, # 11 Exhibit Exhibit 39, # 12 Exhibit Exhibits 40-41, # 13 Exhibit Exhibit 42 (part 1), # 14 Exhibit Exhibits 42 (part 2) - 44)(Selden, David) (Entered: 01/11/2008)
01/11/2008	151	Additional Attachments to Main Document re 148 Statement, *Exhibits 45 - 47* by Plaintiffs Arizona Employers for Immigration Reform, Inc., Chamber of Commerce of the USA, Arizona Chamber of Commerce, Arizona Hispanic Chamber of Commerce, Inc., Arizona Farm Bureau Federation, Arizona Restaurant and Hospitality Association, Arizona Contractors Association, Inc., Associated Minority Contractors of America, Arizona Roofing Contractors Association, National Roofing Contractors' Association, Arizona Landscape Contractors Association, Inc. (Attachments: # 1 Exhibit Exhibit 45 (part 2), # 2 Exhibit Exhibit 45 (part 3), # 3 Exhibit Exhibit 45 (part 4), # 4 Exhibit Exhibit 45 (part 5), # 5 Exhibit Exhibit 45 (part 6), # 6 Exhibit Exhibit 45 (part 7), # 7 Exhibit Exhibit 45 (part 8), # 8 Exhibit Exhibit 46 (part 1), # 9 Exhibit Exhibit 46 (part 2), # 10 Exhibit

DATE	NO.	PROCEEDINGS
		Exhibit 46 (part 3) - 47)(Selden, David) (Entered: 01/11/2008)
01/11/2008	152	Additional Attachments to Main Document re 148 Statement, *Exhibits 48-61* by Plaintiffs Arizona Employers for Immigration Reform, Inc., Chamber of Commerce of the USA, Arizona Chamber of Commerce, Arizona Hispanic Chamber of Commerce, Inc., Arizona Farm Bureau Federation, Arizona Restaurant and Hospitality Association, Arizona Contractors Association, Inc., Associated Minority Contractors of America, Arizona Roofing Contractors Association, National Roofing Contractors' Association, Arizona Landscape Contractors Association, Inc. (Attachments: # 1 Exhibit Exhibit 49 (part 1), # 2 Exhibit Exhibit 49 (part 2) - 51, # 3 Exhibit Exhibit 52 (part 1), # 4 Exhibit Exhibit 52 (part 2), # 5 Exhibit Exhibit 52 (part 3), # 6 Exhibit Exhibit 52 (part 4), # 7 Exhibit Exhibit 52 (part 5), # 8 Exhibit Exhibit 52 (part 6), # 9 Exhibit Exhibit 52 (part 7), # 10 Exhibit Exhibits 53-56, # 11 Exhibit Exhibits 57-61)(Selden, David) (Entered: 01/11/2008)
01/11/2008	153	ANSWER to 1 Complaint by Terence C Haner.(Lessler, Michael) (Entered: 01/11/2008)

DATE	NO.	PROCEEDINGS
01/14/2008	154	ORDER granting 106 STIPULATION. Dfts named in this order are not required to respond to the Requests for Production of Documents and Request for Admission served on them on December 11-13, 2007 by Plaintiffs Arizona Contractors Association, Inc. et al.; as Business Group Plaintiffs have withdrawn their pending discovery requests. Signed by Judge Neil V Wake on 1/11/08. (LSP) (Entered: 01/14/2008)
01/14/2008	155	ORDER granting 134 STIPULATION re Consolidation. The hearing on the Motion for Preliminary Injunction set for 1/16/08 is consolidated with a trial on the merits. See order for details of the filing deadlines. The fifth and sixth claims are withdrawn and dismissed without prejudice. Defendants shall submit their answers by 1/11/08. No motions to dismiss this case shall be filed by Defendants. Signed by Judge Neil V Wake on 1/11/08. (LSP) (Entered: 01/14/2008)
01/14/2008	156	ORDER denying 13 Plas' Motion for Protective Order Regarding John Doe Members and the the anonymous affidavits are stricken, without prejudice to refiling the motion if Plaintiffs think it necessary. Signed by Judge Neil V Wake on 1/14/08.(LSP) (Entered: 01/14/2008)

DATE	NO.	PROCEEDINGS
01/14/2008	157	Notice re Clarification of Record by Derek D Rapier re 144 Reply to Response to Motion, (Hall, Roger) (Entered: 01/14/2008)
01/14/2008	158	Notice re Notice of Filing of Declaration and Supplemental Expert Report of Marc R. Rosenblum by Arizona Employers for Immigration Reform, Inc., Chamber of Commerce of the USA, Arizona Chamber of Commerce, Arizona Hispanic Chamber of Commerce, Inc., Arizona Farm Bureau Federation, Arizona Restaurant and Hospitality Association, Arizona Contractors Association, Inc., Associated Minority Contractors of America, Arizona Roofing Contractors Association, National Roofing Contractors' Association, Arizona Landscape Contractors Association, Inc. (Attachments: # 1 Exhibit Declaration and Supplemental Expert Report of Marc R. Rosenblum)(Selden, David) (Entered: 01/14/2008)
01/14/2008	159	AFFIDAVIT of George Borjas re 107 Response to Motion, *(Second Supplemental Affidavit) for Preliminary Injunction* by Defendant Andrew P Thomas. (GilBride, Eileen) (Entered: 01/14/2008)
01/15/2008	160	ORDER that the parties be prepared to address the questions included in this order at the 1/16/08 trial. Signed

DATE	NO.	PROCEEDINGS
		by Judge Neil V Wake on 1/15/08. (LSP) (Entered: 01/15/2008)
01/15/2008	161	BRIEF *State Defendants' Sur-Reply* by Defendant Terry Goddard filed by Terry Goddard. (O'Grady, Mary) (Entered: 01/15/2008)
01/16/2008	162	Joinder *of Defendant James P. Walsh to State Defendants' Sur-Reply* by Defendant James P Walsh. (Roll, Chris) (Entered: 01/16/2008)
01/16/2008	163	RESPONSE re 160 Order *dated January 15, 2008 filed by the Court* by Plaintiffs Arizona Employers for Immigration Reform, Inc., Chamber of Commerce of the USA, Arizona Chamber of Commerce, Arizona Hispanic Chamber of Commerce, Inc., Arizona Farm Bureau Federation, Arizona Restaurant and Hospitality Association, Arizona Contractors Association, Inc., Associated Minority Contractors of America, Arizona Roofing Contractors Association, National Roofing Contractors' Association, Arizona Landscape Contractors Association, Inc. (Selden, David) (Entered: 01/16/2008)
01/16/2008	164	Notice re of Filing Second Supplemental Affidavit of George Borjas by Andrew P Thomas re 159 Affidavit (GilBride, Eileen) (Entered: 01/16/2008)

DATE	NO.	PROCEEDINGS
01/16/2008	165	Minute Entry. Proceedings held before Judge Neil V Wake: Bench Trial begun on 1/16/2008; Injunction Hearing held on 1/16/2008 re 4 MOTION for Preliminary Injunction, Court takes the issues under advisement. (Court Reporter Laurie Adams.)(LSP) (Entered: 01/17/2008)
01/16/2008	202	TEXT-ONLY Minute Entry. Administrative Only to conclude bench trial entry from this date. Bench Trial completed on 1/16/2008. (Court Reporter Laurie Adams.) This is a TEXT ENTRY ONLY. There is no PDF document associated with this entry. (SJF,) (Entered: 04/15/2008)
01/17/2008	166	TRANSCRIPT DESIGNATION AND ORDER FORM by Arizona Employers for Immigration Reform, Inc., Chamber of Commerce of the USA, Arizona Chamber of Commerce, Arizona Hispanic Chamber of Commerce, Inc., Arizona Farm Bureau Federation, Arizona Restaurant and Hospitality Association, Arizona Contractors Association, Inc., Associated Minority Contractors of America, Arizona Roofing Contractors Association, National Roofing Contractors' Association, Arizona Landscape Contractors Association, Inc. for proceedings held on 1-16-08 before Judge Wake. (Selden, David) (Entered: 01/17/2008)

DATE	NO.	PROCEEDINGS
01/17/2008	167	TRANSCRIPT DESIGNATION AND ORDER FORM by Valle Del Sol Inc for proceedings held on 1/16/08 before Judge Neil V. Wake. (Weissglass, Jonathan) (Entered: 01/17/2008)
01/18/2008	168	TRANSCRIPT DESIGNATION AND ORDER FORM by Wake Up Arizona! Inc. for proceedings held on January 16, 2008 before Judge Neil V. Wake. (Blanchard, Charles) (Entered: 01/18/2008)
01/18/2008	169	TRANSCRIPT DESIGNATION AND ORDER FORM by Andrew P Thomas for proceedings held on 01/16/08 before Judge Neil V. Wake. (GilBride, Eileen) (Entered: 01/18/2008)
01/18/2008	170	TRANSCRIPT DESIGNATION AND ORDER FORM by Criss Candelaria, Ed Rheinheimer, Daisy Flores, Kenny Angle, Derek D Rapier, Martin Brannan, Matthew J Smith, George Silva, Sheila Polk, Melvin R Bowers, Jr for proceedings held on January 16, 2008 before Judge Neil V. Wake. (Hall, Roger) (Entered: 01/18/2008)
01/23/2008	171	TRANSCRIPT DESIGNATION AND ORDER FORM by Terry Goddard, Fidelis V Garcia, Gale Garriott for proceedings held on 01/16/2008 before Judge Neil V. Wake. (O'Grady, Mary) (Entered: 01/23/2008)

DATE	NO.	PROCEEDINGS
01/24/2008	172	TRANSCRIPT of Proceedings re: Bench Trial - Injunction Hearing held on 1/16/08 before Judge Neil V Wake. Court Reporter: Laurie A Adams. Transcript may be viewed at the court public terminal or purchased through the Court Reporter/Transcriber before the deadline for Release of Transcript Restriction. After that date it may be obtained through PACER. Redaction Request due 2/14/2008. Redacted Transcript Deadline set for 2/25/2008. Release of Transcript Restriction set for 4/23/2008. (VAR) (Entered: 01/25/2008)
01/25/2008	173	NOTICE OF FILING OF OFFICIAL TRANSCRIPT (VAR) (Entered: 01/25/2008)
02/01/2008	174	Notice re Notice of Supplemental Authority by Terry Goddard (O'Grady, Mary) (Entered: 02/01/2008)
02/07/2008	175	ORDER - IT IS THEREFORE ORDERED that the Clerk enter jgm dismissing these actions as against Dft Arizona Atty General Terry Goddard without prejudice for lack of subject matter jurisdiction, there being no justiciable case or controversy against him. FURTHER ORDERED as to all other Dfts that the Clerk enter jgm against Plas and in favor of those Dfts and that Plas take nothing. The Clerk shall terminate this action.

DATE	NO.	PROCEEDINGS
		FURTHER ORDERED that the 4 Motion for TRO and Doc. # 3 in No. CV 07-2518 are denied. Signed by Judge Neil V Wake on 2/7/08. (SAT) (Entered: 02/07/2008)
02/07/2008	176	JUDGMENT IN A CIVIL CASE - IT IS ORDERED AND ADJUDGED that pursuant to the Court's order filed February 7, 2008, Defendant Terry Goddard is dismissed without prejudice for lack of subject matter jurisdiction. Judgment is entered in favor of all remaining defendants and against plaintiffs. Plaintiffs to take nothing, and complaint and action are dismissed. (SAT) (Entered: 02/07/2008)
02/07/2008	177	MEMORANDUM - re motion for injunction pending appeal and letters received from members of the public (see pdf attached for more details). Signed by Judge Neil V Wake on 2/7/08. (SAT) (Entered: 02/07/2008)
02/08/2008	178	Notice re Notice of Appeal to 9th Circuit, as to 176 Judgment, 175 Order, and 75 Order by Arizona Employers for Immigration Reform, Inc., Chamber of Commerce of the USA, Arizona Chamber of Commerce, Arizona Hispanic Chamber of Commerce, Inc., Arizona Farm Bureau Federation, Arizona Restaurant and Hospitality Association, Arizona Contractors As-

DATE	NO.	PROCEEDINGS
		sociation, Inc., Associated Minority Contractors of America, Arizona Roofing Contractors Association, National Roofing Contractors' Association, Arizona Landscape Contractors Association, Inc. (Selden, David) Modified on 2/12/2008, DOCKET TEXT MODIFIED TO CORRECT DOCUMENT LINKAGE. INCORRECT EVENT TYPE SELECTED, THIS ENTRY REDOCKETED AT 186 , (LSP). (Entered: 02/08/2008)
02/08/2008	179	NOTICE OF APPEAL to 9th Circuit, as to 75 Order, 175 Order and 176 Judgment by Valle Del Sol Inc, Chicanos Por La Causa, Inc., Somos America. Filing fee received: $ 455.00, receipt number 0970000000001720891. (Weissglass, Jonathan) Modified on 2/12/2008, DOCKET TEXT MODIFIED TO CORRECT DOCUMENT LINKAGE, (LSP). (Entered: 02/08/2008)
02/08/2008	180	NOTICE OF APPEAL to 9th Circuit, as to 176 Clerk's Judgment, 75 Order, 175 Order on Motion for TRO, by Wake Up Arizona! Inc. Filing fee received: $ 455.00, receipt number 0970000000001720944. (Blanchard, Charles) (Entered: 02/08/2008)
02/08/2008		Appeal to 9th Circuit Court of Appeals Fee Received: $ 455.00 receipt num-

DATE	NO.	PROCEEDINGS
		ber 09700000000001721291 (Selden, David) (Entered: 02/08/2008)
02/08/2008	186	NOTICE OF APPEAL to 9th Circuit, as to 176 Clerk's Judgment, 175 Order, and 75 Order, by Arizona Employers for Immigration Reform, Inc., Chamber of Commerce of the USA, Arizona Chamber of Commerce, Arizona Hispanic Chamber of Commerce, Inc., Arizona Farm Bureau Federation, Arizona Restaurant and Hospitality Association, Arizona Contractors Association, Inc., Associated Minority Contractors of America, Arizona Roofing Contractors Association, National Roofing Contractors' Association, Arizona Landscape Contractors Association, Inc. (NOTE: PDF document attached to docket entry 178 using incorrect docket event; redocketed to utilize correct "Notice of Appeal" event). (LSP) (Entered: 02/12/2008)
02/11/2008	181	MOTION for Preliminary Injunction *Pending Appeal* by Arizona Employers for Immigration Reform, Inc., Chamber of Commerce of the USA, Arizona Chamber of Commerce, Arizona Hispanic Chamber of Commerce, Inc., Arizona Farm Bureau Federation, Arizona Restaurant and Hospitality Association, Arizona Contractors Association, Inc., Associated Minority Contractors of America, Arizo-

DATE	NO.	PROCEEDINGS
		na Roofing Contractors Association, National Roofing Contractors' Association, Arizona Landscape Contractors Association, Inc. (Selden, David) (Entered: 02/11/2008)
02/11/2008	182	MOTION for Preliminary Injunction *Pending Appeal* by Valle Del Sol Inc. (Weissglass, Jonathan) (Entered: 02/11/2008)
02/11/2008	183	Joinder re 181 MOTION for Preliminary Injunction *Pending Appeal* by Plaintiff Wake Up Arizona! Inc. (Nomkin, Joel) (Entered: 02/11/2008)
02/11/2008		CADS Sent re 179 Notice of Appeal: Civil Appeals Docketing Statement sent to 9th Circuit on this date. (ESL) (Entered: 02/11/2008)
02/12/2008	184	Notice of Appeal Notification Form; Notice of Appeal and copy of docket sheet transmitted to Ninth Circuit and all parties re 179 Notice of Appeal. (LSP) (Entered: 02/12/2008)
02/12/2008	185	Notice of Appeal Notification Form; Notice of Appeal and copy of docket sheet transmitted to Ninth Circuit and all parties re 180 Notice of Appeal. (LSP) (Entered: 02/12/2008)
02/12/2008	187	Notice of Appeal Notification Form; Notice of Appeal and copy of docket sheet transmitted to Ninth Circuit

DATE	NO.	PROCEEDINGS
		and all parties re 186 Notice of Appeal. (LSP) (Entered: 02/12/2008)
02/13/2008	188	RESPONSE in Opposition re 182 MOTION for Preliminary Injunction *Pending Appeal*, 181 MOTION for Preliminary Injunction *Pending Appeal and Response to Request for Expedited Consideration Without Oral Argument* filed by Andrew P Thomas. (GilBride, Eileen) (Entered: 02/13/2008)
02/13/2008	189	RESPONSE to Motion re 182 MOTION for Preliminary Injunction *Pending Appeal*, 181 MOTION for Preliminary Injunction *Pending Appeal* filed by Terry Goddard, Fidelis V Garcia, Gale Garriott. (O'Grady, Mary) (Entered: 02/13/2008)
02/13/2008	190	Joinder *of Defendant James P. Walsh, Pinal County Attorney, to State Defendants' Response to Motions for Injunction Pending Appeal* by Defendant James P Walsh. (Roll, Chris) (Entered: 02/13/2008)
02/13/2008	191	Joinder *in State Defendants' Response* by Defendant Barbara LaWall filed by Barbara LaWall. (Jurkowitz, Daniel) (Entered: 02/13/2008)
02/13/2008	192	Joinder *in State Defendants' Response to Motions for Injunction Pending Appeal* by Defendant Jon Smith. (Kerekes, William) (Entered: 02/13/2008)

DATE	NO.	PROCEEDINGS
02/13/2008	193	Notice re Transcripts by Wake Up Arizona! Inc. (Blanchard, Charles) (Entered: 02/13/2008)
02/14/2008	194	STATEMENT of of Position re State Defendants' Response to Motions for Injunction Pending Appeal re 189 Response to Motion by Defendants Criss Candelaria, Ed Rheinheimer, Daisy Flores, Kenny Angle, Derek D Rapier, Martin Brannan, Matthew J Smith, George Silva, Sheila Polk, Melvin R Bowers, Jr. (Hall, Roger) (Entered: 02/14/2008)
02/14/2008	195	Joinder *of Defendant Terence C. Hance, Coconino County Attorney, to State Defendants' Response to Motions for Injunction Pending Appeal* by Defendant Terence C Haner. (Lessler, Michael) (Entered: 02/14/2008)
02/15/2008	196	TRANSCRIPT DESIGNATION AND ORDER FORM by Valle Del Sol Inc, Chicanos Por La Causa, Inc., Somos America for proceedings held on 12/18/07 and 1/16/08 before Judge Neil V. Wake, re 179 Notice of Appeal, (Smullin, Rebecca) (Entered: 02/15/2008)
02/19/2008	197	ORDER denying 181 Motion for Preliminary Injunction; denying 182 Motion for Preliminary Injunction and denying 183 Joinder. Signed by Judge

DATE	NO.	PROCEEDINGS
		Neil V Wake on 2/19/08.(LSP) (Entered: 02/19/2008)
02/25/2008	198	Ninth Circuit Case Number 08-15357 for 178 and 186 Notice of Appeal filed by Arizona Contractors Association. (LSP) (Entered: 02/25/2008)
02/25/2008	199	Ninth Circuit Case Number 08-15359 for 179 Notice of Appeal filed by Valle Del Sol, Inc. (LSP) (Entered: 02/25/2008)
02/25/2008	200	Ninth Circuit Case Number 08-15360 for 180 Notice of Appeal filed by Wake Up Arizona, Inc. (LSP) (Entered: 02/25/2008)
03/06/2008	201	CERTIFICATE OF RECORD TRANSMITTED TO 9TH CIRCUIT COURT OF APPEALS re 179 Notice of Appeal, 180 Notice of Appeal, 186 Notice of Appeal. (LSP) (Entered: 03/06/2008)
04/03/2009	203	MANDATE of 9th Circuit (Certified Copy), affirming the decision of the District Court, re: 08-15357, 08-15359, 08-15360 179 , 180 , 186 Notice of Appeal (Attachments: # 1 Order and Amended Opinion, # 2 Opinion, # 3 NDA)(REW,) (Entered: 04/03/2009)

U.S. DISTRICT COURT
DISTRICT OF ARIZONA (PHOENIX DIVISION)

Civil Docket For Case # 2:07-cv-02518-NVW
Date Filed: 12/12/2007

VALLE DEL SOL, INC., et al

v.

TERRY GODDARD, et al

DOCKET ENTRIES

DATE	NO.	PROCEEDINGS
12/12/2007	1	COMPLAINT. Filing fee received: $ 350.00, receipt number 0970000000001607221 (TRO Requested), filed by Valle Del Sol Inc, Chicanos Por La Causa, Inc., Somos America. (Attachments: # 1 Civil Cover Sheet, # 2 Summons Summons. Goddard, # 3 Summons Summons. Garriott, # 4 Summons Summons. Thomas, # 5 Exhibit Exhibit.A, # 6 Exhibit Exhibit.B, # 7 Exhibit Exhibit.C, # 8 Exhibit Exhibit.D) (Campbell, Kristina) (Entered: 12/12/2007)
12/12/2007	2	MOTION to Reassign Case *and Consolidate* by Valle Del Sol Inc, Chicanos Por La Causa, Inc., Somos America. (Attachments: # 1 Order Reassigning Case)(Campbell, Kristina) (Entered: 12/12/2007)

DATE	NO.	PROCEEDINGS
12/12/2007	3	MOTION for Temporary Restraining Order *and Order to Show Cause re: Preliminary Injunction* by Valle Del Sol Inc, Chicanos Por La Causa, Inc., Somos America. (Attachments: # 1 Memorandum of Points and Authorities in Support of Temporary Restraining Order and Preliminary Injunction, # 2 Exhibit A, # 3 Exhibit B, # 4 Exhibit C, # 5 Exhibit D, # 6 Exhibit E, # 7 Exhibit F, # 8 Exhibit G, # 9 Exhibit H, # 10 Exhibit I, # 11 Exhibit J, # 12 Exhibit K, # 13 Exhibit L, # 14 Declaration of Tyler Moran, # 15 Declaration of Luz Sarmina, # 16 Declaration of Jonathan Weissglass, # 17 Weissglass Exhibit A, # 18 Weissglass Exhibit B, # 19 Weissglass Exhibit C) (Campbell, Kristina) (Entered: 12/12/2007)
12/12/2007		This case has been assigned to the Honorable Stephen M. McNamee. All future pleadings or documents should bear the correct case number: CV 07-2518-PHX-SMM. (Entered by REK) (Entered: 12/13/2007)
12/12/2007	4	Notice re Magistrate Consent Form (REK) (Entered: 12/13/2007)
12/13/2007	5	Notice re Amended Summons by Valle Del Sol Inc, Chicanos Por La Causa, Inc., Somos America (Campbell, Kristina) (Entered: 12/13/2007)

DATE	NO.	PROCEEDINGS
12/13/2007	6	Notice re Amended Summons by Valle Del Sol Inc, Chicanos Por La Causa, Inc., Somos America (Campbell, Kristina) (Entered: 12/13/2007)
12/13/2007	7	Notice re Amended Summons by Valle Del Sol Inc, Chicanos Por La Causa, Inc., Somos America (Campbell, Kristina) (Entered: 12/13/2007)
12/13/2007	8	Summons Issued as to Terry Goddard, Andrew Thomas, Gale Garriott. (Attachments: # 1 Thomas, # 2 Garriott)(REK). *** IMPORTANT: You must select "Document and stamps" or "Document and comments" on the print screen in order for the court seal to appear on the summons you print. (Entered: 12/13/2007)
12/14/2007	9	ORDER that this case and the pending motions be referred to the Clerk of the Court for reassignment by random lot. That a copy of this Order be transmitted to the Honorable Neil. V. Wake. Please open attached pdf for full details. Signed by Judge Stephen M McNamee on 12/14/07. (Attachments: # 1 Reassignment Letter) (ESL) (Entered: 12/14/2007)
12/14/2007	10	CONSOLIDATION ORDER - MEMBER CASE with Lead Case number CV 07-2496 PHX-NVW. Case reassigned to Judge Neil V Wake for all further proceedings. Judge Frederick

DATE	NO.	PROCEEDINGS
		J Martone terminated. Plaintiffs 2 Motion to Reassign and Consolidate is granted. Motion Hearing re 3 Motion for Temporary Restraining Order filed in CV 07-2496 PHX-NVW is set for 12/18/07 at 1:30. Signed by Judge Neil V Wake on 12/14/07. (Attachments: # 1 Letter)(LSP) (Entered: 12/14/2007)
12/17/2007	11	SUMMONS Returned Executed by Valle Del Sol Inc, Chicanos Por La Causa, Inc., Somos America. Gale Garriott served on 12/14/2007. (Campbell, Kristina) Modified on 12/18/2007 DOCUMENT FILED IN ERROR. ATTORNEY NOTICED TO REFILE DOCUMENT IN CORRECT CASE (ESL). (Entered: 12/17/2007)
12/17/2007	12	SUMMONS Returned Executed by Valle Del Sol Inc, Chicanos Por La Causa, Inc., Somos America. Terry Goddard served on 12/14/2007. (Campbell, Kristina) Modified on 12/18/2007 DOCUMENT FILED IN ERROR, ATTORNEY NOTICED TO REFILE DOCUMENT IN CORRECT CASE (ESL). (Entered: 12/17/2007)
12/17/2007	13	SUMMONS Returned Executed by Valle Del Sol Inc, Chicanos Por La Causa, Inc., Somos America. Andrew Thomas served on 12/14/2007. (Campbell, Kristina) Modified on 12/18/2007 DOCUMENT FILED IN ERROR, ATTORNEY NOTICED TO REFILE

DATE	NO.	PROCEEDINGS
		DOCUMENT IN CORRECT CASE (ESL). (Entered: 12/17/2007)
12/18/2007	14	NOTICE TO FILER OF DEFICIENCY re 11 Summons Returned Executed - Complaint/Habeas Petition Only filed by Valle Del Sol Inc, Chicanos Por La Causa, Inc., Somos America, 13 Summons Returned Executed - Complaint/Habeas Petition Only filed by Valle Del Sol Inc, Chicanos Por La Causa, Inc., Somos America, 12 Summons Returned Executed - Complaint/Habeas Petition Only filed by Valle Del Sol Inc, Chicanos Por La Causa, Inc., Somos America. Description of deficiency: Document entered in wrong case. FOLLOW UP REQUIRED. (ESL,) (Entered: 12/18/2007)
01/04/2008	15	MOTION for Admission Pro Hac Vice as to attorney Linton Joaquin for Plaintiffs by Valle Del Sol Inc. (Attachments: # 1 Text of Proposed Order Order for Admission Pro Hac Vice)(Joaquin, Linton) Modified on 1/7/2008 (LAD) DOCUMENT FILED IN ERROR. ATTORNEY NOTICED TO REFILE DOCUMENT IN LEAD CASE, CV-07-2496-PHX-NVW. (Entered: 01/04/2008)
01/04/2008	16	MOTION for Admission Pro Hac Vice as to attorney Karen C. Tumlin for Plaintiffs by Valle Del Sol Inc. (At-

DATE	NO.	PROCEEDINGS
		tachments: # 1 Text of Proposed Order Order for Admission Pro Hac Vice) (Joaquin, Linton) Modified on 1/7/2008 (LAD). DOCUMENT FILED IN ERROR. ATTORNEY NOTICED TO REFILE DOCUMENT IN LEAD CASE, CV-07-2496-PHX-NVW. (Entered: 01/04/2008)
01/04/2008	17	MOTION for Admission Pro Hac Vice as to attorney Monica T. Guizar for Plaintiffs by Valle Del Sol Inc. (Attachments: # 1 Text of Proposed Order Order for Admission Pro Hac Vice)(Joaquin, Linton) Modified on 1/7/2008 (LAD). DOCUMENT FILED IN ERROR. ATTORNEY NOTICE TO REFILE DOCUMENT IN LEAD CASE, CV-07-2496-PHX-NWV. (Entered: 01/04/2008)
01/04/2008	18	NOTICE TO FILER OF DEFICIENCY re 17 MOTION for Admission Pro Hac Vice as to attorney Monica T. Guizar 16 MOTION for Admission Pro Hac Vice as to attorney Karen C. Tumlin, 15 MOTION for Admission Pro Hac Vice as to attorney Linton Joaquin filed by Valle Del Sol Inc. Description of deficiency: Documents entered in wrong case. FOLLOW UP REQUIRED. PLEASE OPEN ATTACHED PDF FOR FULL DETAILS. (ESL,) (Entered: 01/04/2008)

DATE	NO.	PROCEEDINGS
02/07/2008	19	JUDGMENT IN A CIVIL CASE - IT IS ORDERED AND ADJUDGED that pursuant to the Court's order filed February 7, 2008 (#175 in CV 07-2496-PHX-NVW), Defendant Terry Goddard is dismissed without prejudice for lack of subject matter jurisdiction. Judgment is entered in favor of all remaining defendants and against plaintiffs. Plaintiffs to take nothing, and complaint and action are dismissed. (SAT) (Entered: 02/07/2008)
02/07/2008	20	MEMORANDUM - re motion for injunction pending appeal and letters received from members of the public (see pdf attached for more details). Signed by Judge Neil V Wake on 2/7/08. (SAT) Modified on 2/7/2008 (SAT). DOCUMENT FILED IN ERROR, DOCUMENT RE-FILED INCORRECT CASE BY THE CLERK. (Entered: 02/07/2008)
02/07/2008	21	NOTICE OF CORRECTION BY THE CLERK re 20 Order. Description of deficiency: Document entered in wrong case. Follow up by Clerks Office: The deficiency indicated above has been addressed by the Clerk. Court use only: SAT. (SAT) (Entered: 02/07/2008)

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Court of Appeals Docket # 07-17272
Docketed: 12/14/2007

CHICANOS POR LA CAUSA, INC.; SOMOS AMERICA,
Plaintiffs-Appellants,

and

ARIZONA EMPLOYERS FOR IMMIGRATION REFORM INC.; CHAMBER OF COMMERCE OF THE UNITED STATES; ARIZONA CHAMBER OF COMMERCE; ARIZONA HISPANIC CHAMBER OF COMMERCE; ARIZONA FARM BUREAU FEDERATION; ARIZONA RESTAURANT AND HOSPITALITY ASSOCIATION; ASSOCIATED MINORITY CONTRACTORS OF AMERICA; ARIZONA ROOFING CONTRACTORS ASSOCIATION; NATIONAL ROOFING CONTRACTORS' ASSOCIATION; WAKE UP ARIZONA! INC.; ARIZONA LANDSCAPE CONTRACTORS' ASSOCIATION; ARIZONA CONTRACTORS ASSOCIATION,
Plaintiffs,

v.

JANET NAPOLITANO; TERRY GODDARD; GALE GARRIOTT,
Defendants-Appellees.

DOCKET ENTRIES

DATE	NO.	PROCEEDINGS
12/14/2007	3	DOCKETED CAUSE AND ENTERED APPEARANCES OF COUNSEL. CADS SENT (Y/N): y. setting schedule as follows: CADS is past due; CADS

DATE	NO.	PROCEEDINGS
		must be filed no later than 12/21/07; appellant's designation of RT is due 12/24/07, ; appellee's designation of RT is due 1/2/08, ; appellant shall order transcript by 1/14/08, ; court reporter shall file transcript in DC by 2/12/08; certificate of record shall be filed by 2/19/08 ; appellant's opening brief is due 3/31/08, ; appellees' brief is due 4/29/08, ; appellants' reply brief is due 5/13/08, ; [07-17272] (KKW)
12/14/2007	5	Filed Appellants CPLC and Somos America's emergency motion for injunction pending appeal; decaration of Jonathan Weissglass; exhibits; served on 12/14/07 [6374644] (to MOATT)
12/19/2007	6	Filed Appellant's reply in support of emergency motion for injunction pending appeal; declaration of Jonathan Weissglass. served on 12/19/07 (COPY IN MOATT) [07-17272] (SW)
12/19/2007	7	Filed attorney for Appellant Civil Appeals Docketing Statement served on 12/13/07 (to CONFATT) [07-17272] [07-17272] (SW)
12/19/2007	8	Filed "electronically" Appellees Janet Napolitano, et al. emergency response to motion for injunction pending appeal [5]; served on 12/19/07 (to MOATT) [07-17272]
12/21/2007	9	Filed order MOATT (Alfred T. GOODWIN, Diarmuid F. O'SCANNLAIN,

DATE	NO.	PROCEEDINGS
		William A. FLETCHER,): Aplt Chicanos Por La Causa, Inc.'s motion to consolidate case no. 07-17272 with case no. 07-17274 is GRANTED. The state has represented that it will refrain from initiating proceedings to enforce the Legal Arizona Workers Act, A.R.S. 22-211 through 214, until at least February 2008. The DC has scheduled argument on the preliminary injunction in Arizona Contractors Association, Inc. v. Candelaria, no. CV-07-2496 PHX-NVW (Arizona II) for 1/16/08 and intends to render a decision before 2/08. Under these circumstances, the panel will defer decision on the emergency motions for injunction pending appeal in these consolidated cases until the DC has issued a decision on the motion for preliminary injunction in Arizona II, provided that decision is reached with reasonable promptness. (CSL FAXED by Moatt) [07-17272, 07-17274]
12/24/2007	10	Received copy of District Court order filed on 12/21/07: the motions for injunction pending appeal are denied - US District Judge Neil V. Wake. (to MOATT) [07-17272, 07-17274] (RT)
12/26/2007	11	Received Appellants CPLC, Somos America notice of designation of reporter's transcript (various hearing

DATE	NO.	PROCEEDINGS
		dates) (CASEFILE). [07-17272, 07-17274] (RT)
01/11/2008	12	Filed Appellant motion for leave to file supplemental brief in support of emergency motion for injunction pending appeal; supplemental brief. (MOATT) [07-17272, 07-17274] served on 1/11/08 [6395936] [07-17272, 07-17274] (SW)
01/18/2008	13	Filed Appellees response to motion for leave to file supplemental brief in support of emergency motion for injunction pending appeal. served on 1/17/08 (MOATT) [07-17272, 07-17274] (SW)
01/30/2008	15	Filed order (Alfred T. GOODWIN, Diarmuid F. O'SCANNLAIN, William A. FLETCHER): Aplts Chicanos Por La Causa's (CPLC) motion for leave to file a supplemental brief in support of the emergency motion for injunction pending appeal is DENIED. This denial is without prejudice to renewing the motion to supplement after the district court has rendered a decision on the preliminary injunction in Arizona Contractors Association, Inc. V. Candelaria, No. CV 07-2496 PHX-NVW, provided that decision is reached with reasonable promptness. in 07-17272, 07-17274 [07-17272, 07-17274] (LA)

DATE	NO.	PROCEEDINGS
02/01/2008	30	Case rejected from Circuit Mediation Program. (SB)
02/08/2008	17	Filed Appellant CPLC renewal of (i) emergency motion for injunction pending appeal; and (ii) motion for leave to file supplemental brief. (COPY IN MOATT) [07-17272, 07-17274] served on 2/8/08 [07-17272, 07-17274] (SW)
02/12/2008	18	Filed Appellant Wake Up Arizona! motion for leave to file supplemental memorandum in support of motion for injunction pending appeal with supplemental memorandum in support of motion for injunction pending appeal. (MOATT) [07-17272, 07-17274] served on 2/11/08 [07-17272, 07-17274] (SW)
02/13/2008	19	*FAX* Filed pltf aplts renewed emerg mtn for inj pending appeal under CR 27-3. [07-17272, 07-17274] ; served on 2/12/08 MOATT (RCVD HARDCOPY OF EMERGENCY MOTION FOR INJUNCTION) (CW)
02/18/2008	21	Filed Defendants-Appellees response to (1) Chicanos Por La Causa renewal of emergency motion for injunction pending appeal and motion for leave to file supplemental brief and (2) Wake Up AZ's motion for leave to file supplemental memorandum supporting motion for injunction pending appeal. served on 2/15/08 (MOATT) [07-17272, 07-17274] (SW)

DATE	NO.	PROCEEDINGS
02/19/2008	20	Filed Appellant CPLC, reply in support of (i) renewal of emergency motion and (ii) motion for leave to file supplemental brief. (COPY ON MOATT) [07-17272, 07-17274] (SW)
02/19/2008	22	Filed "FAXED ORIGINAL" Appellant AZ Contractors Association, Inc. et al. motion for consolidation with identical appeals. (MOATT) [07-17272, 07-17274] served on 2/19/08 [07-17272, 07-17274] (SW)
02/20/2008	23	Filed Arizona Contractors response to defendants-aples motion strike. served on 2/19/08 (MOATT) [07-17272, 07-17274] (SW)
02/20/2008	24	Filed Wake Up Arizona! Arizona! reply to response to ; served on 2/19/08 (MOATT) [07-17272, 07-17274] (SW)
02/22/2008	25	Filed attorney for Appellant in 07-17272 Civil Appeals Docketing Statement served on 2/19/08 (to CONFATT) [07-17272] [07-17272] (SW)
02/22/2008	26	Filed Appellant Arizona Contractors Corporate Disclosure Statement. Served on 2/21/08 (CASEFILE) [07-17272, 07-17274] (SW)
02/22/2008	27	Filed order MOATT (LN) The following briefing schedule govern these consolidated appeals: the consolidated opening briefs and excerpts of record are due March 31, 2008; the consoli-

DATE	NO.	PROCEEDINGS
		dated answering brief is due April 29, 2008; and the consolidated optional reply brief is due within 14 days after service of the answering brief. All parties on a side are encouraged to join in a single brief to the greatest extent practicable. The briefing schedule may be revised at a party's request following disposition of the pending emergency motions. [07-17272, 07-17274, 08-15357, 08-15359, 08-15360] (SW)
02/28/2008	28	Filed order (J. CLIFFORD WALLACE, EDWARD LEAVY and PAMELA ANN RYMER) Denying appellants' emergency motions for injunction pending appeal; Granting renewed motions of appellants Chicanos Por La Causa, Inc. and Wake Up Arizona!, Inc. for leave to file supplemental briefs in support of the emergency motion for injunction pending appeal; Granting Appellant Wake Up Arizona!, Inc.'s motion to join in the emergency motion filed by Arizona Contractors Association, Inc.; Granting the motions of appellees Andrew Thomas, Fidelis Garcia, Gale Garriott and Terry Goddard to file responses to the emergency motion in excess of 20 pages; Granting the various County Attorney appellees' motions to join in Mr. Thomas' response; Denying as moot all other pending motions. The previously-established briefing sche-

DATE	NO.	PROCEEDINGS
		dule remains in effect. (FAXED to parties on 2/28/08) (SS)
03/28/2008	29	Calendar check performed. [07-17272, 07-17274, 08-15357, 08-15359, 08-15360] (MW)
03/31/2008	34	Filed original and 15 copies of Appellants (Informal: No) Consolidated opening brief of 61 pages. Five copies Excerpts of record in 6 volumes. Served on 03/31/2008. [07-17272, 07-17274, 08-15357, 08-15359, 08-15360] (FT)
04/01/2008	31	(Amended) Received original and 15 copies of Appellants Substitute opening brief (Informal: No) 61 pages. Served on 04/01/2008. Deficiency: Other deficiencies: motion pending Notified counsel. [07-17272, 07-17274, 08-15357, 08-15359, 08-15360]—[Edited 04/07/2008 by BY]—[Edited 04/07/2008 by BY] (FT)
04/01/2008	32	Filed Appellants motion to file substitute or corrected brief (replacement). Served on 04/01/2008. [07-17272, 07-17274, 08-15357, 08-15359, 08-15360] (PANEL)—[Edited 04/16/2008 by BY] (FT)
04/02/2008	33	Received notice regarding proof of service. [07-17272, 07-17274, 08-15357, 08-15359, 08-15360] (RC)

DATE	NO.	PROCEEDINGS
04/07/2008	40	Received original and 15 copies of Amicus Curiae United States Hispanic Chamber of Commerce brief in 15 pages. Deficiency: Motion needed to file amicus brief. Served on. 04/07/2008 Notified counsel. [07-17272, 07-17274, 08-15357, 08-15359, 08-15360] (FT)
04/07/2008	42	Filed Amicus Curiae United States Hispanic Chamber of Commerce in 07-17272 motion for leave to file brief as amicus curiae. Served on 04/07/2008. [07-17272, 07-17274, 08-15357, 08-15359, 08-15360] (PANEL) (FT)
04/09/2008	35	Calendar materials being prepared. [07-17272, 07-17274, 08-15357, 08-15359, 08-15360] (AM)
04/09/2008	36	Received original and 15 copies of Amicus Curiae Lawyers Committee For Civil Rights of the San Francisco Bay Area brief in 21 pages. Deficiency: Motion pending Served on. 04/09/2008 [07-17272, 07-17274, 08-15357, 08-15359, 08-15360] (FT)
04/09/2008	37	Filed Amicus Curiae Lawyers Committee For Civil Rights of the San Francisco Bay Area in 07-17272, 07-17274, 08-15357, 08-15359, 08-15360 motion to file an amicus curiae brief, served on 04/09/2008 [07-17272, 07-17289, 07-17274, 08-15357, 08-15359, 08-15360] (PANEL)—[Edited 04/16/2008 by BY] (FT)

DATE	NO.	PROCEEDINGS
04/09/2008	38	Filed National Federation of Independent Business Small Business Legal Center motion to to become amicus curiae, served on 04/08/2008 [07-17272, 07-17274, 08-15357, 08-15359, 08-15360] (PANEL) (Motion is attached to brief)—[Edited 04/16/2008 by BY] (FT)
04/09/2008	39	Received original and 15 copies of Amicus Curiae National Federation of Independent Business Small Business Legal Center in 07-17272, 07-17274 brief in 27 pages. Deficiency: Motion pending Other deficiencies: (Font appears to be too small). Served on. 04/08/2008 . [07-17272, 07-17274, 08-15357, 08-15359, 08-15360] (FT)
04/14/2008	41	CALENDARED: 06/12/2008 9:00 AM San Francisco, CA Courtroom 1 (AM)
04/14/2008	43	Received original and 15 copies of Amicus Curiaes Oklahoma State Chamber of Commerce, Associated Industries Incorporated, Florida Chamber of Commerce and Tennessee Chamber of Commerce brief in 29 pages. Deficiency: Motion needed to file amicus brief. Served on. 04/09/2008 Notified counsel. [07-17272, 07-17274, 08-15357, 08-15359, 08-15360] (FT)
04/14/2008	46	Filed original and 15 copies of Florida Chamber of Commerce, Oklahoma State Chamber of Commerce

DATE	NO.	PROCEEDINGS
		and Tennessee Chamber of Commerce, etc amicus brief of 29 pages. Served on 04/09/2008 [07-17272, 07-17274, 08-15357, 08-15359, 08-15360] (PANEL) (FT)
04/17/2008	44	Filed appearance notice of Attorney(s) Omar C. Jadwat for party(s) – Chicanos Por La Causa, Inc. Valle Del Sol Inc - Somos America, in case 08-15360 Attorney(s) Omar C. Jadwat for party(s) Appellant CPLC Appellant Somos America, in case 07-17272 Attorney(s) Omar C. Jadwat for party(s) Appellant Chicanos Por La Causa, Inc. Appellant Somos America Valle Del Sol Inc, in case 08-15359 Attorney(s) Omar C. Jadwat for party(s) - Somos America - CPLC, in case 07-17274. Dated on "4/16/07". [07-17272, 07-17274, 08-15359, 08-15360] (RC)
04/18/2008	45	Added attorney Karen C. Tumlin for Appellants, in case 07-17272. (TSP)
04/25/2008	47	Hearing Notice for JUNE Calendar. Please return ACKNOWLEDGEMENT OF HEARING NOTICE form to: SAN FRANCISCO Office. Attention: The Notice of Docket Activity may not list your case number. Please open attached documents to view details about your case. [06-10529, 06-10733, 07-15921, 06-16189, 07-17272, 07-17274, 08-15357, 08-15359, 08-15360] (AM)

DATE	NO.	PROCEEDINGS
04/25/2008	48	Filed clerk order (Deputy Clerk:JF): The National Federation of Independent Business Small Business Legal Center and Associated Builders and Contractors, Inc.'s motion for leave to file an amicus brief is GRANTED. The United States Hispanic Chamber of Commerce's motion for leave to file brief as amicus curiae is GRANTED. The Lawyers' Committee for Civil Rights of the San Francisco Bay Area et al.'s motion for leave to file an amicus curiae brief is GRANTED. Plaintiff-Appellants' motion for leave to file replacement brief is GRANTED. All the briefs are ordered filed. [07-17272, 07-17274, 08-15357, 08-15359, 08-15360] (SC)
04/25/2008	49	Filed original and 15 copies of National Federation of Independent Business Small Business Legal Center in 07-17272 amicus brief of 27 pages. Served on 04/08/2008 [07-17272, 07-17289, 07-17274, 08-15359, 08-15360] (FT)
04/25/2008	50	(AMENDED) Filed original and 15 copies of Lawyers Committee For Civil Rights of the San Francisco Bay Area in 07-17272 amicus brief of 21 pages. Served on 04/09/2008 [07-17272, 07-17274, 08-15357, 08-15359, 08-15360] (PANEL)—[Edited 05/01/2008 by BY] (FT)

DATE	NO.	PROCEEDINGS
04/25/2008	58	Filed original and 15 copies of - Arizona Chamber of Commerce, Arizona Contractors Association, Arizona Employers for Immigration Reform Inc., Arizona Farm Bureau Federation, Arizona Hispanic Chamber of Commerce, Arizona Landscape Contractors' Association, Arizona Restaurant and Hospitality Association, Arizona Roofing Contractors Association, Associated Minority Contractors of America, Chamber of Commerce of the United States and National Roofing Contractors' Association in 07-17272 (Informal: No) substitutionOPENING brief of 61 pages. Served on 04/01/2008. [07-17272, 07-17274, 08-15357, 08-15359, 08-15360] (EXCERPTS ALREADY FILED WITH PREVIOUSLY FILED OPENING BRIEF) (FT)
04/25/2008	61	Filed original and 15 copies of United States Hispanic Chamber of Commerce's amicus brief, in support of aplts, of 15 pages. Served on 04/07/2008 [07-17272, 07-17274, 08-15357, 08-15359, 08-15360] (LA)
04/30/2008	51	(Amended) Filed original and 15 copies of Appellees Consolidated answering brief of 59 pages. Supplemental Excerpts of record in 1 volumes. Served on 04/29/2008. [07-17272, 07-17274, 08-15357, 08-15359, 08-15360]

DATE	NO.	PROCEEDINGS
		(PANEL)—[Edited 05/01/2008 by BY] (FT)
05/06/2008	52	Filed original and 15 copies of Amicus Curiae American Unity Legal Defense in 07-17272, Amicus Curiae American Unity Legal Defense in 07-17274, Amicus Curiae American Unity Legal Defense in 08-15357, Amicus Curiae American Unity Legal Defense in 08-15359 and Amicus Curiae American Unity Legal Defense in 08-15360 amicus brief of 33 pages. Served on 05/05/2008 [07-17272, 07-17274, 08-15357, 08-15359, 08-15360] (PANEL) (FT)
05/12/2008	53	Filed clerk order (Deputy Clerk:pi): Granting Audio-Record Application from Capitol Media Services. [07-17272, 07-17274, 08-15357, 08-15359, 08-15360] (PA)
05/13/2008	54	Filed original and 15 copies of Appellants (Informal: No) reply brief of 27 pages. Further excerpts of record in1volumes. Served on 05/13/2008. [07-17272, 07-17274, 08-15357, 08-15359, 08-15360] (FT)
05/16/2008	55	Received Attorney Michael Jay Lessler, Esq. for Appellee Terrence Haner in 08-15357, 08-15359, 08-15360 letter dated 05/13/2008 re: Mr. Hance should be on the aple's consolidated answering brief. Served on [07-17272, 07-

DATE	NO.	PROCEEDINGS
		17274, 08-15357, 08-15359, 08-15360] (RC)
06/02/2008	56	UPDATED CASE CALENDARED: 06/12/2008 9:00 AM San Francisco, CA Courtroom 1 (AW)
06/05/2008	57	ENTRY UPDATED. Filed - Plaintiffs' additional citations. Served on 6/5/08. (panel) [07-17272, 07-17274, 08-15357, 08-15359, 08-15360] (RC)
06/11/2008	59	Filed Defendants' additional citations. Served on 06/10/2008. (panel) [07-17272, 07-17274, 08-15357, 08-15359, 08-15360] (RC)
06/12/2008	60	ARGUED AND SUBMITTED TO MARY M. SCHROEDER, JOHN WALKER, JR. and N. RANDY SMITH. [07-17272, 07-17274, 08-15357, 08-15359, 08-15360] (RT)
06/25/2008	62	Filed Plaintiffs/Appellants' additional citations. Served on 6/25/08. (panel) [07-17272, 07-17289, 07-17274, 08-15357, 08-15359, 08-15360] (RC)
07/03/2008	63	Filed Appellees' response to Plaintiffs' 6/25/08 additional citations. Served on 07/02/2008. (panel) [07-17272, 07-17274, 08-15357, 08-15359, 08-15360] (RC)
07/08/2008	64	Filed Amicus Curiae National Federation of Independent Business Small Business Legal Center in 07-17272 letter in support of appellants' 6/25/08

DATE	NO.	PROCEEDINGS
		corrrespondence to the court. Served on 7/01/2008. (panel) [07-17272, 07-17274, 08-15357, 08-15359, 08-15360] (EL)
09/17/2008	65	FILED OPINION (MARY M. SCHROEDER, JOHN WALKER, JR. and N. RANDY SMITH) AFFIRMED. FILED AND ENTERED JUDGMENT. [07-17272, 07-17274, 08-15357, 08-15359, 08-15360] (RP)
10/01/2008	66	Filed original and 50 copies of Appellants' petition for panel rehearing and petition for rehearing en banc Number of Pages 19. Served on 10/01/2008. Deficiency: None. Date circulated to the court: 10/02/2008 (PANEL-ACTIVE JUDGES-ANY INTERESTED SENIOR JUDGES) [07-17272, 07-17274, 08-15357, 08-15359, 08-15360] (GV)
10/08/2008	68	Received original and 50 copies of Amici Curiae Lawyers Committee For Civil Rights of the San Francisco Bay Area , 11 pages. Deficiency: Motion pending . Served on 10/08/2008. (PANEL ALL ACTIVE JUDGES AND ALL INTERESTED SENIOR JUDGES) [07-17272, 07-17274, 08-15357, 08-15359, 08-15360] (GV)
10/09/2008	67	Filed Lawyers' Committee for Civil Rights of the San Francisco Bay Area's motion for leave to file an amicus curiae brief in support of

DATE	NO.	PROCEEDINGS
		Plas/Aplts' petition for rehearing; served on 10/8/08 (PANEL) [07-17272, 07-17274, 08-15357, 08-15359, 08-15360] (GV)
12/01/2008	69	Filed order (MARY M. SCHROEDER, JOHN WALKER, JR. and N. RANDY SMITH) Within 14 days from the date of this order, defendants-appellees are directed to file a response to the petition for rehearing and suggestion for rehearing en banc filed by plaintiffs-appellants on October 1, 2008. An original and 50 copies of the response shall be filed with the Clerk of Court, and shall not exceed 15 pages. [07-17272, 07-17274, 08-15357, 08-15359, 08-15360] (SC)
12/08/2008	70	Filed (ECF) Appellees Gale Garriott, Terry Goddard and Janet Napolitano Unopposed Motion to extend time to comply with the order dated. Date of service: 12/08/2008. [6731073] (CM)
12/15/2008	71	Filed (ECF) Appellees Gale Garriott, Terry Goddard and Janet Napolitano in 07-17272, 07-17274, 07-17289, Appellees Fidelis V Garcia, Gale Garriott and Terry Goddard in 08-15357, Appellees Fidelis V Garcia and Terry Goddard in 08-15359, 08-15360 response to Order , Order to set response by any party to anything. Date of service: 12/15/2008. [6739637]. [07-

DATE	NO.	PROCEEDINGS
		17272, 07-17289, 07-17274, 08-15357, 08-15359, 08-15360] (CM)
12/17/2008	72	Electronically-filed document [71] Response to PFPR and/or PFREB (ECF Filing) is stricken because there is an error in the document. Document is not PDF. [07-17272, 07-17289, 07-17274, 08-15357, 08-15359, 08-15360] (LC)
12/18/2008	73	Filed (ECF) Appellees Gale Garriott, Terry Goddard and Janet Napolitano in 07-17272, 07-17274, 07-17289, Appellees Fidelis V Garcia, Gale Garriott and Terry Goddard in 08-15357, 08-15359, 08-15360 response to Order , Order to set response by any party to anything. Date of service: 12/15/2008. [6742812]. [07-17272, 07-17289, 07-17274, 08-15357, 08-15359, 08-15360] (MO)
12/24/2008	74	Submitted (ECF) Amicus brief for review and filed Motion to become amicus curiae. Submitted by Eagle Forum Education & Legal Defense Fund. Date of service: 12/24/2008. [6748544] [07-17272, 07-17289, 07-17274, 08-15357, 08-15359, 08-15360] (LJJ)
03/09/2009	75	Filed order and amended opinion (MARY M. SCHROEDER, JOHN WALKER, JR. and N. RANDY SMITH).The Opinion filed on September 17, 2008, and appearing at 544

DATE	NO.	PROCEEDINGS
		F.3d 976, is amended as follows: (see order for full text). With these amendments, the panel judges have voted to deny the petition for panel rehearing. Judges Schroeder and N.R. Smith have voted to deny the petition for rehearing en banc, and Judge Walker so recommends. The full court has been advised of the petition for rehearing en banc and no judge has requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 35. The petition for rehearing and petition for rehearing en banc are DENIED. No further petitions for rehearing or rehearing en banc will be accepted.[07-17272, 07-17274, 08-15357, 08-15359, 08-15360] (RP)
03/12/2009	76	Filed order (MARY M. SCHROEDER, JOHN WALKER, JR. and N. RANDY SMITH) Lawyers' Committee for Civil Rights of the San Francisco Bay Area's motion for leave to file an amicus curiae brief in support of Plaintiffs-Appellants' petition for rehearing is DENIED. The motion for leave to file amicus curiae brief of Eagle Forum Education & Legal Defense Fund in support of Defendants-Appellees for denial of petitions for rehearing is DENIED. [07-17272, 07-17274, 08-15357, 08-15359, 08-15360] (SC)

DATE	NO.	PROCEEDINGS
03/27/2009	77	MANDATE ISSUED.(MMS, JW and NRS) [07-17272, 07-17289, 07-17274, 08-15357, 08-15359, 08-15360] (GV)
06/09/2009	78	Received letter from the Supreme Court dated 06/02/2009 regarding extending time to file Cert to and including 7/24/98 [sic]. [07-17272, 07-17274, 08-15357, 08-15359, 08-15360] (GV)
08/07/2009	79	Received notice from the Supreme Court: petition for certiorari filed on 07/24/2009. Supreme Court Number 09-115. [7020681] [07-17272, 07-17274, 08-15357, 08-15359, 08-15360] (GV)
06/16/2010	80	Terminated Charles A. Blanchard for Wake Up Arizona! Inc in 08-15357, Wake Up Arizona! Inc in 08-15359 and Wake Up Arizona! Inc in 08-15360 [7373615] [08-15360, 07-17272, 07-17274, 08-15357, 08-15359] — Counsel no longer with Perkins Coie (per phone conversation with firm). Assistant sent information with instructions on how to update ECF account. (ASW)
06/30/2010	81	Received notice from the Supreme Court. Petition for certiorari GRANTED on 06/28/2010. Supreme Court Number 09-115. [7390989] [07-17272, 07-17274, 08-15357, 08-15359, 08-15360] (GV)

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Court of Appeals Docket # 07-17274
Docketed: 12/14/2007

CHICANOS POR LA CAUSA, INC.; SOMOS AMERICA,
Plaintiffs,

and

ARIZONA EMPLOYERS FOR IMMIGRATION REFORM INC.; CHAMBER OF COMMERCE OF THE UNITED STATES; ARIZONA CHAMBER OF COMMERCE; ARIZONA HISPANIC CHAMBER OF COMMERCE; ARIZONA FARM BUREAU FEDERATION; ARIZONA RESTAURANT AND HOSPITALITY ASSOCIATION; ASSOCIATED MINORITY CONTRACTORS OF AMERICA; ARIZONA ROOFING CONTRACTORS ASSOCIATION; NATIONAL ROOFING CONTRACTORS' ASSOCIATION; WAKE UP ARIZONA! INC.; ARIZONA LANDSCAPE CONTRACTORS' ASSOCIATION; ARIZONA CONTRACTORS ASSOCIATION,
Plaintiffs-Appellants,

v.

JANET NAPOLITANO; TERRY GODDARD; GALE GARRIOTT,
Defendants-Appellees.

DOCKET ENTRIES

DATE	NO.	PROCEEDINGS
12/14/2007	1	DOCKETED CAUSE AND ENTERED APPEARANCES OF COUNSEL. CADS SENT (Y/N): Y. setting schedule as follows: CADS is past due;

DATE	NO.	PROCEEDINGS
		CADS must be filed no later than 12/21/07; appellant's designation of RT is due 12/24/07, ; appellee's designation of RT is due 1/2/08, ; appellant shall order transcript by 1/14/08, ; court reporter shall file transcript in DC by 2/12/08; certificate of record shall be filed by 2/19/08 ; appellant's opening brief is due 3/31/08, ; appellees' brief is due 4/29/08, ; appellants' reply brief is due 5/13/08, ; [07-17274] (KKW)
12/17/2007	3	Filed aplts emerg mtn for inj under CR 27-3, declaration of Louis R. Moffa, Jr. [07-17274] ; served on 12/17/07 MOATT (orig rcvd 12/18/07) (CW)
12/18/2007	4	Filed def aples response opposing emergency motion for injunction(hard copy rcv'd 12/24/07) [3] on 12/18/07 MOATT [07-17274] (CW)
12/18/2007	5	Rcvd from aples errata to response to mtn for inj (proof of service) CASEFILE (CW)
12/20/2007	6	Filed aplts reply to response supporting emergency motion for injunction pending appeal, declaration of Louis R. Moffa, Jr. ; served on 12/20/07 MOATT [07-17274] (CW)
12/21/2007	7	Filed order MOATT (Alfred T. GOODWIN, Diarmuid F. O'SCANNLAIN, William A. FLETCHER,): Aplt Chicanos Por La Causa, Inc.'s motion to

DATE	NO.	PROCEEDINGS
		consolidate case no. 07-17272 with case no. 07-17274 is GRANTED. The state has represented that it will refrain from initiating proceedings to enforce the Legal Arizona Workers Act, A.R.S. 22-211 through 214, until at least February 2008. The DC has scheduled argument on the preliminary injunction in Arizona Contractors Association, Inc. v. Candelaria, no. CV-07-2496 PHX-NVW (Arizona II) for 1/16/08 and intends to render a decision before 2/08. Under these circumstances, the panel will defer decision on the emergency motions for injunction pending appeal in these consolidated cases until the DC has issued a decision on the motion for preliminary injunction in Arizona II, provided that decision is reached with reasonable promptness. (CSL FAXED by Moatt) [07-17272, 07-17274]
12/24/2007	8	Received copy of District Court order filed on 12/21/07: the motions for injunction pending appeal are denied - US District Judge Neil V. Wake. (to MOATT) [07-17272, 07-17274] (RT)
12/26/2007	9	Received Appellants CPLC, Somos America notice of designation of reporter's transcript (various hearing dates) (CASEFILE). [07-17272, 07-17274] (RT)

DATE	NO.	PROCEEDINGS
01/11/2008	10	Filed Appellant motion for leave to file supplemental brief in support of emergency motion for injunction pending appeal; supplemental brief. (MOATT) [07-17272, 07-17274] served on 1/11/08 [6395936] [07-17272, 07-17274] (SW)
01/18/2008	11	Filed Appellees response to motion for leave to file supplemental brief in support of emergency motion for injunction pending appeal. served on 1/17/08 (MOATT) [07-17272, 07-17274] (SW)
01/30/2008	12	Filed order (Alfred T. GOODWIN, Diarmuid F. O'SCANNLAIN, William A. FLETCHER): Aplts Chicanos Por La Causa's (CPLC) motion for leave to file a supplemental brief in support of the emergency motion for injunction pending appeal is DENIED. This denial is without prejudice to renewing the motion to supplement after the district court has rendered a decision on the preliminary injunction in Arizona Contractors Association, Inc. V. Candelaria, No. CV 07-2496 PHX-NVW, provided that decision is reached with reasonable promptness. in 07-17272, 07-17274 [07-17272, 07-17274] (LA)
02/08/2008	13	Filed Appellant CPLC renewal of (i) emergency motion for injunction pending appeal; and (ii) motion for leave to file supplemental brief. (COPY IN

DATE	NO.	PROCEEDINGS
		MOATT) [07-17272, 07-17274] served on 2/8/08 [07-17272, 07-17274] (SW)
02/12/2008	14	Filed Appellant Wake Up Arizona! motion for leave to file supplemental memorandum in support of motion for injunction pending appeal with supplemental memorandum in support of motion for injunction pending appeal. (MOATT) [07-17272, 07-17274] served on 2/11/08 [07-17272, 07-17274] (SW)
02/13/2008	15	*FAX* Filed pltf aplts renewed emerg mtn for inj pending appeal under CR 27-3. [07-17272, 07-17274] ; served on 2/12/08 MOATT (RCVD HARDCOPY OF EMERGENCY MOTION FOR INJUNCTION) (CW)
02/18/2008	17	Filed Defendants-Appellees response to (1) Chicanos Por La Causa renewal of emergency motion for injunction pending appeal and motion for leave to file supplemental brief and (2) Wake Up AZ's motion for leave to file supplemental memorandum supporting motion for injunction pending appeal. served on 2/15/08 (MOATT) [07-17272, 07-17274] (SW)
02/19/2008	16	Filed Appellant CPLC, reply in support of (i) renewal of emergency motion and (ii) motion for leave to file supplemental brief. (COPY ON MOATT) [07-17272, 07-17274] (SW)

DATE	NO.	PROCEEDINGS
02/19/2008	18	Filed "FAXED ORIGINAL" Appellant AZ Contractors Association, Inc. et al. motion for consolidation with identical appeals. (MOATT) [07-17272, 07-17274] served on 2/19/08 [07-17272, 07-17274] (SW)
02/20/2008	19	Filed Arizona Contractors response to defendants-aples motion strike. served on 2/19/08 (MOATT) [07-17272, 07-17274] (SW)
02/20/2008	20	Filed Wake Up Arizona! Arizona! reply to response to ; served on 2/19/08 (MOATT) [07-17272, 07-17274] (SW)
02/22/2008	21	Filed Appellant Arizona Contractors Corporate Disclosure Statement. Served on 2/21/08 (CASEFILE) [07-17272, 07-17274] (SW)
02/22/2008	22	Filed order MOATT (LN) The following briefing schedule govern these consolidated appeals: the consolidated opening briefs and excerpts of record are due March 31, 2008; the consolidated answering brief is due April 29, 2008; and the consolidated optional reply brief is due within 14 days after service of the answering brief. All parties on a side are encouraged to join in a single brief to the greatest extent practicable. The briefing schedule may be revised at a party's request following disposition of the pending emergency motions. [07-17272, 07-17274, 08-15357, 08-15359, 08-15360] (SW)

DATE	NO.	PROCEEDINGS
02/28/2008	23	Filed order (J. CLIFFORD WALLACE, EDWARD LEAVY and PAMELA ANN RYMER) Denying appellants' emergency motions for injunction pending appeal; Granting renewed motions of appellants Chicanos Por La Causa, Inc. and Wake Up Arizona!, Inc. for leave to file supplemental briefs in support of the emergency motion for injunction pending appeal; Granting Appellant Wake Up Arizona!, Inc.'s motion to join in the emergency motion filed by Arizona Contractors Association, Inc.; Granting the motions of appellees Andrew Thomas, Fidelis Garcia, Gale Garriott and Terry Goddard to file responses to the emergency motion in excess of 20 pages; Granting the various County Attorney appellees' motions to join in Mr. Thomas' response; Denying as moot all other pending motions. The previously-established briefing schedule remains in effect. (FAXED to parties on 2/28/08) (SS)
03/28/2008	24	Calendar check performed. [07-17272, 07-17274, 08-15357, 08-15359, 08-15360] (MW)
03/31/2008	28	Filed original and 15 copies of Appellants (Informal: No) Consolidated opening brief of 61 pages. Five copies Excerpts of record in 6 volumes. Served on 03/31/2008. [07-17272, 07-

DATE	NO.	PROCEEDINGS
		17274, 08-15357, 08-15359, 08-15360] (FT)
04/01/2008	25	(Amended) Received original and 15 copies of Appellants Substitute opening brief (Informal: No) 61 pages. Served on 04/01/2008. Deficiency: Other deficiencies: motion pending Notified counsel. [07-17272, 07-17274, 08-15357, 08-15359, 08-15360]—[Edited 04/07/2008 by BY]—[Edited 04/07/2008 by BY] (FT)
04/01/2008	26	Filed Appellants motion to file substitute or corrected brief (replacement). Served on 04/01/2008. [07-17272, 07-17274, 08-15357, 08-15359, 08-15360] (PANEL)—[Edited 04/16/2008 by BY] (FT)
04/02/2008	27	Received notice regarding proof of service. [07-17272, 07-17274, 08-15357, 08-15359, 08-15360] (RC)
04/07/2008	34	Received original and 15 copies of Amicus Curiae United States Hispanic Chamber of Commerce brief in 15 pages. Deficiency: Motion needed to file amicus brief. Served on. 04/07/2008 Notified counsel. [07-17272, 07-17274, 08-15357, 08-15359, 08-15360] (FT)
04/07/2008	36	Filed Amicus Curiae United States Hispanic Chamber of Commerce in 07-17272 motion for leave to file brief as amicus curiae. Served on 04/07/2008.

DATE	NO.	PROCEEDINGS
		[07-17272, 07-17274, 08-15357, 08-15359, 08-15360] (PANEL) (FT)
04/09/2008	29	Calendar materials being prepared. [07-17272, 07-17274, 08-15357, 08-15359, 08-15360] (AM)
04/09/2008	30	Received original and 15 copies of Amicus Curiae Lawyers Committee For Civil Rights of the San Francisco Bay Area brief in 21 pages. Deficiency: Motion pending Served on. 04/09/2008 [07-17272, 07-17274, 08-15357, 08-15359, 08-15360] (FT)
4/09/2008	31	Filed Amicus Curiae Lawyers Committee For Civil Rights of the San Francisco Bay Area in 07-17272, 07-17274, 08-15357, 08-15359, 08-15360 motion to file an amicus curiae brief, served on 04/09/2008 [07-17272, 07-17289, 07-17274, 08-15357, 08-15359, 08-15360] (PANEL) [Edited 04/16/2008 by BY] (FT)
04/09/2008	32	Filed National Federation of Independent Business Small Business Legal Center motion to to become amicus curiae, served on 04/08/2008 [07-17272, 07-17274, 08-15357, 08-15359, 08-15360] (PANEL) (Motion is attached to brief)—[Edited 04/16/2008 by BY] (FT)
04/09/2008	33	Received original and 15 copies of Amicus Curiae National Federation of Independent Business Small Business

DATE	NO.	PROCEEDINGS
		Legal Center in 07-17272, 07-17274 brief in 27 pages. Deficiency: Motion pending Other deficiencies: (Font appears to be too small). Served on. 04/08/2008 . [07-17272, 07-17274, 08-15357, 08-15359, 08-15360] (FT)
04/14/2008	35	CALENDARED: 06/12/2008 9:00 AM San Francisco, CA Courtroom 1 (AM)
04/14/2008	37	Received original and 15 copies of Amicus Curiaes Oklahoma State Chamber of Commerce, Associated Industries Incorporated, Florida Chamber of Commerce and Tennessee Chamber of Commerce brief in 29 pages. Deficiency: Motion needed to file amicus brief. Served on. 04/09/2008 Notified counsel. [07-17272, 07-17274, 08-15357, 08-15359, 08-15360] (FT)
04/14/2008	39	Filed original and 15 copies of Florida Chamber of Commerce, Oklahoma State Chamber of Commerce and Tennessee Chamber of Commerce, etc amicus brief of 29 pages. Served on 04/09/2008 [07-17272, 07-17274, 08-15357, 08-15359, 08-15360] (PANEL) (FT)
04/17/2008	38	Filed appearance notice of Attorney(s) Omar C. Jadwat for party(s) – Chicanos Por La Causa, Inc. Valle Del Sol Inc - Somos America, in case 08-15360 Attorney(s) Omar C. Jadwat for party(s) Appellant CPLC Appellant

DATE	NO.	PROCEEDINGS
		Somos America, in case 07-17272 Attorney(s) Omar C. Jadwat for party(s) Appellant Chicanos Por La Causa, Inc. Appellant Somos America Valle Del Sol Inc, in case 08-15359 Attorney(s) Omar C. Jadwat for party(s) - Somos America - CPLC, in case 07-17274. Dated on "4/16/07". [07-17272, 07-17274, 08-15359, 08-15360] (RC)
04/25/2008	40	Hearing Notice for JUNE Calendar. Please return ACKNOWLEDGEMENT OF HEARING NOTICE form to: SAN FRANCISCO Office. Attention: The Notice of Docket Activity may not list your case number. Please open attached documents to view details about your case. [06-10529, 06-10733, 07-15921, 06-16189, 07-17272, 07-17274, 08-15357, 08-15359, 08-15360] (AM)
04/25/2008	41	Filed clerk order (Deputy Clerk:JF): The National Federation of Independent Business Small Business Legal Center and Associated Builders and Contractors, Inc.'s motion for leave to file an amicus brief is GRANTED. The United States Hispanic Chamber of Commerce's motion for leave to file brief as amicus curiae is GRANTED. The Lawyers' Committee for Civil Rights of the San Francisco Bay Area et al.'s motion for leave to file and

DATE	NO.	PROCEEDINGS
		amicus curiae brief is GRANTED. Plaintiff-Appellants' motion for leave to file replacement brief is GRANTED. All the briefs are ordered filed. [07-17272, 07-17274, 08-15357, 08-15359, 08-15360] (SC)
04/25/2008	42	Filed original and 15 copies of National Federation of Independent Business Small Business Legal Center in 07-17272 amicus brief of 27 pages. Served on 04/08/2008 [07-17272, 07-17289, 07-17274, 08-15359, 08-15360] (FT)
04/25/2008	43	(AMENDED) Filed original and 15 copies of Lawyers Committee For Civil Rights of the San Francisco Bay Area in 07-17272 amicus brief of 21 pages. Served on 04/09/2008 [07-17272, 07-17274, 08-15357, 08-15359, 08-15360] (PANEL)—[Edited 05/01/2008 by BY] (FT)
04/25/2008	51	Filed original and 15 copies of - Arizona Chamber of Commerce, Arizona Contractors Association, Arizona Employers for Immigration Reform Inc., Arizona Farm Bureau Federation, Arizona Hispanic Chamber of Commerce, Arizona Landscape Contractors' Association, Arizona Restaurant and Hospitality Association, Arizona Roofing Contractors Association, Associated Minority Contractors of America, Chamber of Commerce of the

DATE	NO.	PROCEEDINGS
		United States and National Roofing Contractors' Association in 07-17272 (Informal: No) substitution OPENING brief of 61 pages. Served on 04/01/2008. [07-17272, 07-17274, 08-15357, 08-15359, 08-15360] (EXCERPTS ALREADY FILED WITH PREVIOUSLY FILED OPENING BRIEF) (FT)
04/25/2008	54	Filed original and 15 copies of United States Hispanic Chamber of Commerce's amicus brief, in support of aplts, of 15 pages. Served on 04/07/2008 [07-17272, 07-17274, 08-15357, 08-15359, 08-15360] (LA)
04/30/2008	44	(Amended) Filed original and 15 copies of Appellees Consolidated answering brief of 59 pages. Supplemental Excerpts of record in 1 volumes. Served on 04/29/2008. [07-17272, 07-17274, 08-15357, 08-15359, 08-15360] (PANEL)—[Edited 05/01/2008 by BY] (FT)
05/06/2008	45	Filed original and 15 copies of Amicus Curiae American Unity Legal Defense in 07-17272, Amicus Curiae American Unity Legal Defense in 07-17274, Amicus Curiae American Unity Legal Defense in 08-15357, Amicus Curiae American Unity Legal Defense in 08-15359 and Amicus Curiae American Unity Legal Defense in 08-15360 amicus brief of 33 pages. Served on

DATE	NO.	PROCEEDINGS
		05/05/2008 [07-17272, 07-17274, 08-15357, 08-15359, 08-15360] (PANEL) (FT)
05/12/2008	46	Filed clerk order (Deputy Clerk:pi): Granting Audio-Record Application from Capitol Media Services. [07-17272, 07-17274, 08-15357, 08-15359, 08-15360] (PA)
05/13/2008	47	Filed original and 15 copies of Appellants (Informal: No) reply brief of 27 pages. Further excerpts of record in1volumes. Served on 05/13/2008. [07-17272, 07-17274, 08-15357, 08-15359, 08-15360] (FT)
05/16/2008	48	Received Attorney Michael Jay Lessler, Esq. for Appellee Terrence Haner in 08-15357, 08-15359, 08-15360 letter dated 05/13/2008 re: Mr. Hance should be on the aple's consolidated answering brief. Served on [07-17272, 07-17274, 08-15357, 08-15359, 08-15360] (RC)
06/02/2008	49	UPDATED CASE CALENDARED: 06/12/2008 9:00 AM San Francisco, CA Courtroom 1 (AW)
06/05/2008	50	ENTRY UPDATED. Filed - Plaintiffs' additional citations. Served on 6/5/08. (panel) [07-17272, 07-17274, 08-15357, 08-15359, 08-15360] (RC)
06/11/2008	52	Filed Defendants' additional citations. Served on 06/10/2008. (panel) [07-

DATE	NO.	PROCEEDINGS
		17272, 07-17274, 08-15357, 08-15359, 08-15360] (RC)
06/12/2008	53	ARGUED AND SUBMITTED TO MARY M. SCHROEDER, JOHN WALKER, JR. and N. RANDY SMITH. [07-17272, 07-17274, 08-15357, 08-15359, 08-15360] (RT)
06/25/2008	55	Filed Plaintiffs/Appellants' additional citations. Served on 6/25/08. (panel) [07-17272, 07-17289, 07-17274, 08-15357, 08-15359, 08-15360] (RC)
07/03/2008	56	Filed Appellees' response to Plaintiffs' 6/25/08 additional citations. Served on 07/02/2008. (panel) [07-17272, 07-17274, 08-15357, 08-15359, 08-15360] (RC)
07/08/2008	57	Filed Amicus Curiae National Federation of Independent Business Small Business Legal Center in 07-17272 letter in support of appellants' 6/25/08 corrrespondence to the court. Served on 7/01/2008. (panel) [07-17272, 07-17274, 08-15357, 08-15359, 08-15360] (EL)
09/17/2008	58	FILED OPINION (MARY M. SCHROEDER, JOHN WALKER, JR. and N. RANDY SMITH) AFFIRMED. FILED AND ENTERED JUDGMENT. [07-17272, 07-17274, 08-15357, 08-15359, 08-15360] (RP)

DATE	NO.	PROCEEDINGS
10/01/2008	59	Filed original and 50 copies of Appellants' petition for panel rehearing and petition for rehearing en banc Number of Pages 19. Served on 10/01/2008. Deficiency: None. Date circulated to the court: 10/02/2008 (PANEL-ACTIVE JUDGES-ANY INTERESTED SENIOR JUDGES) [07-17272, 07-17274, 08-15357, 08-15359, 08-15360] (GV)
10/08/2008	61	Received original and 50 copies of Amici Curiae Lawyers Committee For Civil Rights of the San Francisco Bay Area , 11 pages. Deficiency: Motion pending . Served on 10/08/2008. (PANEL ALL ACTIVE JUDGES AND ALL INTERESTED SENIOR JUDGES) [07-17272, 07-17274, 08-15357, 08-15359, 08-15360] (GV)
10/09/2008	60	Filed Lawyers' Committee for Civil Rights of the San Francisco Bay Area's motion for leave to file an amicus curiae brief in support of Plas/Aplts' petition for rehearing; served on 10/8/08 (PANEL) [07-17272, 07-17274, 08-15357, 08-15359, 08-15360] (GV)
12/01/2008	62	Filed order (MARY M. SCHROEDER, JOHN WALKER, JR. and N. RANDY SMITH) Within 14 days from the date of this order, defendants-appellees are directed to file a response to the petition for rehearing and suggestion for

DATE	NO.	PROCEEDINGS
		rehearing en banc filed by plaintiffs-appellants on October 1, 2008. An original and 50 copies of the response shall be filed with the Clerk of Court, and shall not exceed 15 pages. [07-17272, 07-17274, 08-15357, 08-15359, 08-15360] (SC)
12/15/2008	63	Filed (ECF) Appellees Gale Garriott, Terry Goddard and Janet Napolitano in 07-17272, 07-17274, 07-17289, Appellees Fidelis V Garcia, Gale Garriott and Terry Goddard in 08-15357, Appellees Fidelis V Garcia and Terry Goddard in 08-15359, 08-15360 response to Order , Order to set response by any party to anything. Date of service: 12/15/2008. [6739637]. [07-17272, 07-17289, 07-17274, 08-15357, 08-15359, 08-15360] (CM)
12/17/2008	64	Electronically-filed document [63] Response to PFPR and/or PFREB (ECF Filing) is stricken because there is an error in the document. Document is not PDF. [07-17272, 07-17289, 07-17274, 08-15357, 08-15359, 08-15360] (LC)
12/18/2008	65	Filed (ECF) Appellees Gale Garriott, Terry Goddard and Janet Napolitano in 07-17272, 07-17274, 07-17289, Appellees Fidelis V Garcia, Gale Garriott and Terry Goddard in 08-15357, 08-15359, 08-15360 response to Order , Order to set response by any party to

DATE	NO.	PROCEEDINGS
		anything. Date of service: 12/15/2008. [6742812]. [07-17272, 07-17289, 07-17274, 08-15357, 08-15359, 08-15360] (MO)
12/24/2008	66	Submitted (ECF) Amicus brief for review and filed Motion to become amicus curiae. Submitted by Eagle Forum Education & Legal Defense Fund. Date of service: 12/24/2008. [6748544] [07-17272, 07-17289, 07-17274, 08-15357, 08-15359, 08-15360] (LJJ)
03/09/2009	67	Filed order and amended opinion (MARY M. SCHROEDER, JOHN WALKER, JR. and N. RANDY SMITH).The Opinion filed on September 17, 2008, and appearing at 544 F.3d 976, is amended as follows: (see order for full text). With these amendments, the panel judges have voted to deny the petition for panel rehearing. Judges Schroeder and N.R. Smith have voted to deny the petition for rehearing en banc, and Judge Walker so recommends. The full court has been advised of the petition for rehearing en banc and no judge has requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 35. The petition for rehearing and petition for rehearing en banc are DENIED. No further petitions for rehearing or rehearing en banc will be

DATE	NO.	PROCEEDINGS
		accepted.[07-17272, 07-17274, 08-15357, 08-15359, 08-15360] (RP)
03/12/2009	68	Filed order (MARY M. SCHROEDER, JOHN WALKER, JR. and N. RANDY SMITH) Lawyers' Committee for Civil Rights of the San Francisco Bay Area's motion for leave to file an amicus curiae brief in support of Plaintiffs-Appellants' petition for rehearing is DENIED. The motion for leave to file amicus curiae brief of Eagle Forum Education & Legal Defense Fund in support of Defendants-Appellees for denial of petitions for rehearing is DENIED. [07-17272, 07-17274, 08-15357, 08-15359, 08-15360] (SC)
03/27/2009	69	MANDATE ISSUED.(MMS, JW and NRS) [07-17272, 07-17289, 07-17274, 08-15357, 08-15359, 08-15360] (GV)
06/09/2009	70	Received letter from the Supreme Court dated 06/02/2009 regarding extending time to file Cert to and including 7/24/98 [sic]. [07-17272, 07-17274, 08-15357, 08-15359, 08-15360] (GV)
08/07/2009	71	Received notice from the Supreme Court: petition for certiorari filed on 07/24/2009. Supreme Court Number 09-115. [7020681] [07-17272, 07-17274, 08-15357, 08-15359, 08-15360] (GV)

DATE	NO.	PROCEEDINGS
06/16/2010	72	Terminated Charles A. Blanchard for Wake Up Arizona! Inc in 08-15357, Wake Up Arizona! Inc in 08-15359 and Wake Up Arizona! Inc in 08-15360 [7373615] [08-15360, 07-17272, 07-17274, 08-15357, 08-15359] — Counsel no longer with Perkins Coie (per phone conversation with firm). Assistant sent information with instructions on how to update ECF account. (ASW)
06/30/2010	73	Received notice from the Supreme Court. Petition for certiorari GRANTED on 06/28/2010. Supreme Court Number 09-115. [7390989] [07-17272, 07-17274, 08-15357, 08-15359, 08-15360] (GV)

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Case Number: 08-15357
Docketed: 02/20/2008

ARIZONA CONTRACTORS ASSOCIATION, INC.; ARIZONA EMPLOYERS FOR IMMIGRATION REFORM INC.; CHAMBER OF COMMERCE OF THE UNITED STATES; ARIZONA CHAMBER OF COMMERCE; ARIZONA HISPANIC CHAMBER OF COMMERCE INC.; ARIZONA FARM BUREAU FEDERATION; ARIZONA RESTAURANT AND HOSPITALITY ASSOCIATION; ASSOCIATED MINORITY CONTRACTORS OF AMERICA; ARIZONA ROOFING CONTRACTORS ASSOCIATION; NATIONAL ROOFING CONTRACTORS ASSOCIATION; ARIZONA LANDSCAPE CONTRACTOR ASSOCIATION,
Plaintiffs-Appellants,

and

WAKE UP ARIZONA! INC; VALLE DEL SOL INC; CHICANOS POR LA CAUSA, INC.; SOMOS AMERICA,
Plaintiffs,

v.

CRISS CANDELARIA; ED RHEINHEIMER; TERRENCE HANER; DAISY FLORES; KENNY ANGLE; DEREK D. RAPIER; MARTIN BRANNAN; ANDREW PEYTON THOMAS; MATTHEW J SMITH; JAMES CURRIER; BARBARA LAWALL; JAMES P WALSH; GEORGE SILVA; SHEILA POLK; JON SMITH; TERRY GODDARD; FIDELIS V GARCIA; GALE GARRIOTT; MELVIN R. BOWERS, JR.,
Defendants-Appellees.

DOCKET ENTRIES

DATE	NO.	PROCEEDINGS
02/20/2008	1	DOCKETED CAUSE AND ENTERED APPEARANCES OF COUNSEL. CADS SENT (Y/N): y. setting schedule as follows: CADS is past due; CADS must be filed no later than 2/27/08; appellant's designation of RT is due 2/19/08, ; appellee's designation of RT is due 2/28/08, ; appellant shall order transcript by 3/10/08, ; court reporter shall file transcript in DC by 4/9/08, ; certificate of record shall be filed by 4/16/08 ; appellant's opening brief is due 5/27/08, ; appellees' brief is due 6/25/08, ; appellants' reply brief is due 7/9/08, ; [08-15357] (KKW)
02/21/2008	3	Filed Julie A. Pace for Appellant AZ Landscape Contra, Appellant National Roofing, Appellant AZ Roofing Contract, Appellant Associated Minority, Appellant AZ Restaurant and Ho, Appellant AZ Farm Bureau Fed, Appellant AZ Hispanic Chamber, Appellant AZ Chamber of Commer, Appellant Chamber of Commerce, Appellant AZ Employers for Im, Appellant AZ Contractors Ass. in 08-15357 Civil Appeals Docketing Statement served on 2/19/08 (to CONFATT) [08-15357] [08-15357] (KKW)
02/21/2008	4	Filed Appellant AZ Contractors Ass. in 08-15357 emergency motion to for injunction served on 2/21/08 MOATT. (KKW)

DATE	NO.	PROCEEDINGS
02/21/2008	5	Filed Aplts in 08-15359 emergency motion to for injunction ; served on 2/21/08 MOATT. (KKW)
02/21/2008	6	Filed Appellant Valle Del Sol Inc in 08-15359's motion to file oversized emergency mtn served on 2/21/08 MOATT. [08-15357, 08-15359, 08-15360] (KKW)
02/21/2008	7	Filed Appellant Wake Up Arizona! Inc in 08-15360 joinder in emergency motion for injunction ; served on 2/21/08 MOATT. (KKW)
02/22/2008	8	Received copy of District Court order filed on 2/19/08 denying mtn for preliminary injunction. CASEFILE. [08-15357, 08-15359, 08-15360] (KKW)
02/22/2008	9	Filed Aplts AZ Contractors Ass. Et al's Corporate Disclosure Statement. Served on 2/21/08 [08-15357, 08-15359, 08-15360] (KKW)
02/22/2008	12	Filed order MOATT (LN) The following briefing schedule govern these consolidated appeals: the consolidated opening briefs and excerpts of record are due March 31, 2008; the consolidated answering brief is due April 29, 2008; and the consolidated optional reply brief is due within 14 days after service of the answering brief. All parties on a side are encouraged to join in a single brief to the greatest extent practicable. The briefing schedule may

DATE	NO.	PROCEEDINGS
		be revised at a party's request following disposition of the pending emergency motions. [07-17272, 07-17274, 08 15357, 08-15359, 08-15360] (SW)
02/25/2008	10	Filed Andrew P Thomas motion to file consolidated response to emergency mtn in excess of 20 pages served on 2/25/08 MOATT. (KKW)
02/25/2008	11	Filed Appellee Andrew P Thomas response opposing emergency motion for injunction served on 2/25/08 MOATT. [08-15357, 08-15359, 08-15360] (KKW)
02/26/2008	13	Filed notice of joinder in State Defendants-Appellees' consolidated response to emergency mtns for injuction pending appeal served on 2/26/08 MOATT. (KKW)
02/26/2008	14	Filed joinder of Defendant James P. Walsh, Pinal County Attorney, to State Defendants-Appelles' consolidated response to emergency mtns for injunction pending appeal served on 2/26/08 MOATT. [08-15357, 08-15359, 08-15360] (KKW)
02/26/2008	15	Statement of Position of Ten County attorneys to state defendants' and Maricopa County's mtn for injunction pending appeal MOATT. [08-15357, 08-15359, 08-15360] (KKW)
02/26/2008	16	Filed Aplts' consolidated rpy in support of emergency mtns for injuction

DATE	NO.	PROCEEDINGS
		pending appeal ; served on 2/26/08 MOATT. [08-15357, 08-15359, 08-15360] (KKW)
02/26/2008	17	Filed notice of appearance of Roger W. Hall as attorney for Aples County Attorneys of Apache, Cochise, Gila, Graham, Greenlee, La Paz, Mohave, Navajo Santa Cruz and Yavapai Counties. [08-15357, 08-15359, 08-15360] (KKW)
02/27/2008	18	Received Appellant notice of designation of reporter's transcript. [08-15357] (KKW)
02/27/2008	19	Received notice of joinder in State Defendants-Appellees' consolidated response to emergency mtns for injuction pending appeal MOATT. (KKW)
02/28/2008	20	Filed order (J. CLIFFORD WALLACE, EDWARD LEAVY and PAMELA ANN RYMER) Denying appellants' emergency motions for injunction pending appeal; Granting renewed motions of appellants Chicanos Por La Causa, Inc. and Wake Up Arizona!, Inc. for leave to file supplemental briefs in support of the emergency motion for injunction pending appeal; Granting Appellant Wake Up Arizona!, Inc.'s motion to join in the emergency motion filed by Arizona Contractors Association, Inc.; Granting the motions of appellees Andrew

DATE	NO.	PROCEEDINGS
		Thomas, Fidelis Garcia, Gale Garriott and Terry Goddard to file responses to the emergency motion in excess of 20 pages; Granting the various County Attorney appellees' motions to join in Mr. Thomas' response; Denying as moot all other pending motions. The previously-established briefing schedule remains in effect. (FAXED to parties on 2/28/08) (SS)
03/10/2008	21	Filed certificate of record on appeal. RT filed in DC 1.2.08, 1.24.08 [08-15357, 08-15359, 08-15360] (RC)
03/28/2008	22	Calendar check performed. [07-17272, 07-17274, 08-15357, 08-15359, 08-15360] (MW)
03/31/2008	26	Filed original and 15 copies of Appellants (Informal: No) Consolidated opening brief of 61 pages. Five copies Excerpts of record in 6 volumes. Served on 03/31/2008. [07-17272, 07-17274, 08-15357, 08-15359, 08-15360] (FT)
04/01/2008	23	(Amended) Received original and 15 copies of Appellants Substitute opening brief (Informal: No) 61 pages. Served on 04/01/2008. Deficiency: Other deficiencies: motion pending Notified counsel. [07-17272, 07-17274, 08-15357, 08-15359, 08-15360]—[Edited 04/07/2008 by BY]—[Edited 04/07/2008 by BY] (FT)

DATE	NO.	PROCEEDINGS
04/01/2008	24	Filed Appellants motion to file substitute or corrected brief (replacement). Served on 04/01/2008. [07-17272, 07-17274, 08-15357, 08-15359, 08-15360] (PANEL)—[Edited 04/16/2008 by BY] (FT)
04/02/2008	25	Received notice regarding proof of service. [07-17272, 07-17274, 08-15357, 08-15359, 08-15360] (RC)
04/07/2008	32	Received original and 15 copies of Amicus Curiae United States Hispanic Chamber of Commerce brief in 15 pages. Deficiency: Motion needed to file amicus brief. Served on. 04/07/2008 Notified counsel. [07-17272, 07-17274, 08-15357, 08-15359, 08-15360] (FT)
04/07/2008	34	Filed Amicus Curiae United States Hispanic Chamber of Commerce in 07-17272 motion for leave to file brief as amicus curiae. Served on 04/07/2008. [07-17272, 07-17274, 08-15357, 08-15359, 08-15360] (PANEL) (FT)
04/09/2008	27	Calendar materials being prepared. [07-17272, 07-17274, 08-15357, 08-15359, 08-15360] (AM)
04/09/2008	28	Received original and 15 copies of Amicus Curiae Lawyers Committee For Civil Rights of the San Francisco Bay Area brief in 21 pages. Deficiency: Motion pending Served on. 04/09/2008

DATE	NO.	PROCEEDINGS
		[07-17272, 07-17274, 08-15357, 08-15359, 08-15360] (FT)
04/09/2008	29	Filed Amicus Curiae Lawyers Committee For Civil Rights of the San Francisco Bay Area in 07-17272, 07-17274, 08-15357, 08-15359, 08-15360 motion to file an amicus curiae brief, served on 04/09/2008 [07-17272, 07-17289, 07-17274, 08-15357, 08-15359, 08-15360] (PANEL)—[Edited 04/16/2008 by BY] (FT)
04/09/2008	30	Filed National Federation of Independent Business Small Business Legal Center motion to to become amicus curiae, served on 04/08/2008 [07-17272, 07-17274, 08-15357, 08-15359, 08-15360] (PANEL) (Motion is attached to brief)—[Edited 04/16/2008 by BY] (FT)
04/09/2008	31	Received original and 15 copies of Amicus Curiae National Federation of Independent Business Small Business Legal Center in 07-17272, 07-17274 brief in 27 pages. Deficiency: Motion pending Other deficiencies: (Font appears to be too small). Served on. 04/08/2008 . [07-17272, 07-17274, 08-15357, 08-15359, 08-15360] (FT)
04/14/2008	33	CALENDARED: 06/12/2008 9:00 AM San Francisco, CA Courtroom 1 (AM)
04/14/2008	35	Received original and 15 copies of Amicus Curiaes Oklahoma State

DATE	NO.	PROCEEDINGS
		Chamber of Commerce, Associated Industries Incorporated, Florida Chamber of Commerce and Tennessee Chamber of Commerce brief in 29 pages. Deficiency: Motion needed to file amicus brief. Served on. 04/09/2008 Notified counsel. [07-17272, 07-17274, 08-15357, 08-15359, 08-15360] (FT)
04/14/2008	36	Filed original and 15 copies of Florida Chamber of Commerce, Oklahoma State Chamber of Commerce and Tennessee Chamber of Commerce, etc amicus brief of 29 pages. Served on 04/09/2008 [07-17272, 07-17274, 08-15357, 08-15359, 08-15360] (PANEL) (FT)
04/25/2008	37	Hearing Notice for JUNE Calendar. Please return ACKNOWLEDGEMENT OF HEARING NOTICE form to: SAN FRANCISCO Office. Attention: The Notice of Docket Activity may not list your case number. Please open attached documents to view details about your case. [06-10529, 06-10733, 07-15921, 06-16189, 07-17272, 07-17274, 08-15357, 08-15359, 08-15360] (AM)
04/25/2008	38	Filed clerk order (Deputy Clerk:JF): The National Federation of Independent Business Small Business Legal Center and Associated Builders and Contractors, Inc.'s motion for leave to

DATE	NO.	PROCEEDINGS
		file an amicus brief is GRANTED. The United States Hispanic Chamber of Commerce's motion for leave to file brief as amicus curiae is GRANTED. The Lawyers' Committee for Civil Rights of the San Francisco Bay Area et al.'s motion for leave to file and amicus curiae brief is GRANTED. Plaintiff-Appellants' motion for leave to file replacement brief is GRANTED. All the briefs are ordered filed. [07-17272, 07-17274, 08-15357, 08-15359, 08-15360] (SC)
04/25/2008	39	(AMENDED) Filed original and 15 copies of Lawyers Committee For Civil Rights of the San Francisco Bay Area in 07-17272 amicus brief of 21 pages. Served on 04/09/2008 [07-17272, 07-17274, 08-15357, 08-15359, 08-15360] (PANEL)—[Edited 05/01/2008 by BY] (FT)
04/25/2008	48	Filed original and 15 copies of - Arizona Chamber of Commerce, Arizona Contractors Association, Arizona Employers for Immigration Reform Inc., Arizona Farm Bureau Federation, Arizona Hispanic Chamber of Commerce, Arizona Landscape Contractors' Association, Arizona Restaurant and Hospitality Association, Arizona Roofing Contractors Association, Associated Minority Contractors of America, Chamber of Commerce of the

DATE	NO.	PROCEEDINGS
		United States and National Roofing Contractors' Association in 07-17272 (Informal: No) substitutionOPENING brief of 61 pages. Served on 04/01/2008. [07-17272, 07-17274, 08-15357, 08-15359, 08-15360] (EXCERPTS ALREADY FILED WITH PREVIOUSLY FILED OPENING BRIEF) (FT)
04/25/2008	51	Filed original and 15 copies of United States Hispanic Chamber of Commerce's amicus brief, in support of aplts, of 15 pages. Served on 04/07/2008 [07-17272, 07-17274, 08-15357, 08-15359, 08-15360] (LA)
04/30/2008	40	(Amended) Filed original and 15 copies of Appellees Consolidated answering brief of 59 pages. Supplemental Excerpts of record in 1 volumes. Served on 04/29/2008. [07-17272, 07-17274, 08-15357, 08-15359, 08-15360] (PANEL)—[Edited 05/01/2008 by BY] (FT)
05/06/2008	42	Filed original and 15 copies of Amicus Curiae American Unity Legal Defense in 07-17272, Amicus Curiae American Unity Legal Defense in 07-17274, Amicus Curiae American Unity Legal Defense in 08-15357, Amicus Curiae American Unity Legal Defense in 08-15359 and Amicus Curiae American Unity Legal Defense in 08-15360 amicus brief of 33 pages. Served on

DATE	NO.	PROCEEDINGS
		05/05/2008 [07-17272, 07-17274, 08-15357, 08-15359, 08-15360] (PANEL) (FT)
05/07/2008	41	Case rejected from Circuit Mediation Program. [08-15357, 08-15359, 08-15360] (BC)
05/12/2008	43	Filed clerk order (Deputy Clerk:pi): Granting Audio-Record Application from Capitol Media Services. [07-17272, 07-17274, 08-15357, 08-15359, 08-15360] (PA)
05/13/2008	44	Filed original and 15 copies of Appellants (Informal: No) reply brief of 27 pages. Further excerpts of record in1volumes. Served on 05/13/2008. [07-17272, 07-17274, 08-15357, 08-15359, 08-15360] (FT)
05/16/2008	45	Received Attorney Michael Jay Lessler, Esq. for Appellee Terrence Haner in 08-15357, 08-15359, 08-15360 letter dated 05/13/2008 re: Mr. Hance should be on the aple's consolidated answering brief. Served on [07-17272, 07-17274, 08-15357, 08-15359, 08-15360] (RC)
06/02/2008	46	UPDATED CASE CALENDARED: 06/12/2008 9:00 AM San Francisco, CA Courtroom 1 (AW)
06/05/2008	47	ENTRY UPDATED. Filed - Plaintiffs' additional citations. Served on 6/5/08.

DATE	NO.	PROCEEDINGS
		(panel) [07-17272, 07-17274, 08-15357, 08-15359, 08-15360] (RC)
06/11/2008	49	Filed Defendants' additional citations. Served on 06/10/2008. (panel) [07-17272, 07-17274, 08-15357, 08-15359, 08-15360] (RC)
06/12/2008	50	ARGUED AND SUBMITTED TO MARY M. SCHROEDER, JOHN WALKER, JR. and N. RANDY SMITH. [07-17272, 07-17274, 08-15357, 08-15359, 08-15360] (RT)
06/25/2008	52	Filed Plaintiffs/Appellants' additional citations. Served on 6/25/08. (panel) [07-17272, 07-17289, 07-17274, 08-15357, 08-15359, 08-15360] (RC)
07/03/2008	53	Filed Appellees' response to Plaintiffs' 6/25/08 additional citations. Served on 07/02/2008. (panel) [07-17272, 07-17274, 08-15357, 08-15359, 08-15360] (RC)
07/08/2008	54	Filed Amicus Curiae National Federation of Independent Business Small Business Legal Center in 07-17272 letter in support of appellants' 6/25/08 corrrespondence to the court. Served on 7/01/2008. (panel) [07-17272, 07-17274, 08-15357, 08-15359, 08-15360] (EL)
09/17/2008	55	FILED OPINION (MARY M. SCHROEDER, JOHN WALKER, JR. and N. RANDY SMITH) AFFIRMED.

DATE	NO.	PROCEEDINGS
		FILED AND ENTERED JUDGMENT. [07-17272, 07-17274, 08-15357, 08-15359, 08-15360] (RP)
10/01/2008	56	Filed original and 50 copies of Appellants' petition for panel rehearing and petition for rehearing en banc Number of Pages 19. Served on 10/01/2008. Deficiency: None. Date circulated to the court: 10/02/2008 (PANEL-ACTIVE JUDGES-ANY INTERESTED SENIOR JUDGES) [07-17272, 07-17274, 08-15357, 08-15359, 08-15360] (GV)
10/08/2008	58	Received original and 50 copies of Amici Curiae Lawyers Committee For Civil Rights of the San Francisco Bay Area , 11 pages. Deficiency: Motion pending . Served on 10/08/2008. (PANEL ALL ACTIVE JUDGES AND ALL INTERESTED SENIOR JUDGES) [07-17272, 07-17274, 08-15357, 08-15359, 08-15360] (GV)
10/09/2008	57	Filed Lawyers' Committee for Civil Rights of the San Francisco Bay Area's motion for leave to file an amicus curiae brief in support of Plas/Aplts' petition for rehearing; served on 10/8/08 (PANEL) [07-17272, 07-17274, 08-15357, 08-15359, 08-15360] (GV)
12/01/2008	59	Filed order (MARY M. SCHROEDER, JOHN WALKER, JR. and N. RANDY SMITH) Within 14 days from the date

DATE	NO.	PROCEEDINGS
		of this order, defendants-appellees are directed to file a response to the petition for rehearing and suggestion for rehearing en banc filed by plaintiffs-appellants on October 1, 2008. An original and 50 copies of the response shall be filed with the Clerk of Court, and shall not exceed 15 pages. [07-17272, 07-17274, 08-15357, 08-15359, 08-15360] (SC)
12/15/2008	60	Filed (ECF) Appellees Gale Garriott, Terry Goddard and Janet Napolitano in 07-17272, 07-17274, 07-17289, Appellees Fidelis V Garcia, Gale Garriott and Terry Goddard in 08-15357, Appellees Fidelis V Garcia and Terry Goddard in 08-15359, 08-15360 response to Order , Order to set response by any party to anything. Date of service: 12/15/2008. [6739637]. [07-17272, 07-17289, 07-17274, 08-15357, 08-15359, 08-15360] (CM)
12/17/2008	61	Electronically-filed document [60] Response to PFPR and/or PFREB (ECF Filing) is stricken because there is an error in the document. Document is not PDF. [07-17272, 07-17289, 07-17274, 08-15357, 08-15359, 08-15360] (LC)
12/18/2008	62	Filed (ECF) Appellees Gale Garriott, Terry Goddard and Janet Napolitano in 07-17272, 07-17274, 07-17289, Appellees Fidelis V Garcia, Gale Garriott

DATE	NO.	PROCEEDINGS
		and Terry Goddard in 08-15357, 08-15359, 08-15360 response to Order , Order to set response by any party to anything. Date of service: 12/15/2008. [6742812]. [07-17272, 07-17289, 07-17274, 08-15357, 08-15359, 08-15360] (MO)
12/24/2008	63	Submitted (ECF) Amicus brief for review and filed Motion to become amicus curiae. Submitted by Eagle Forum Education & Legal Defense Fund. Date of service: 12/24/2008. [6748544] [07-17272, 07-17289, 07-17274, 08-15357, 08-15359, 08-15360] (LJJ)
03/09/2009	64	Filed order and amended opinion (MARY M. SCHROEDER, JOHN WALKER, JR. and N. RANDY SMITH).The Opinion filed on September 17, 2008, and appearing at 544 F.3d 976, is amended as follows: (see order for full text). With these amendments, the panel judges have voted to deny the petition for panel rehearing. Judges Schroeder and N.R. Smith have voted to deny the petition for rehearing en banc, and Judge Walker so recommends. The full court has been advised of the petition for rehearing en banc and no judge has requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 35. The petition for rehearing and petition for rehearing en banc are DE-

DATE	NO.	PROCEEDINGS
		NIED. No further petitions for rehearing or rehearing en banc will be accepted.[07-17272, 07-17274, 08-15357, 08-15359, 08-15360] (RP)
03/12/2009	65	Filed order (MARY M. SCHROEDER, JOHN WALKER, JR. and N. RANDY SMITH) Lawyers' Committee for Civil Rights of the San Francisco Bay Area's motion for leave to file an amicus curiae brief in support of Plaintiffs-Appellants' petition for rehearing is DENIED. The motion for leave to file amicus curiae brief of Eagle Forum Education & Legal Defense Fund in support of Defendants-Appellees for denial of petitions for rehearing is DENIED. [07-17272, 07-17274, 08-15357, 08-15359, 08-15360] (SC)
03/27/2009	66	MANDATE ISSUED.(MMS, JW and NRS) [07-17272, 07-17289, 07-17274, 08-15357, 08-15359, 08-15360] (GV)
06/09/2009	67	Received letter from the Supreme Court dated 06/02/2009 regarding extending time to file Cert to an including 7/24/98 [sic]. [07-17272, 07-17274, 08-15357, 08-15359, 08-15360] (GV)
08/07/2009	68	Received notice from the Supreme Court: petition for certiorari filed on 07/24/2009. Supreme Court Number 09-115. [7020681] [07-17272, 07-17274, 08-15357, 08-15359, 08-15360] (GV)

DATE	NO.	PROCEEDINGS
06/16/2010	69	Terminated Charles A. Blanchard for Wake Up Arizona! Inc in 08-15357, Wake Up Arizona! Inc in 08-15359 and Wake Up Arizona! Inc in 08-15360 [7373615] [08-15360, 07-17272, 07-17274, 08-15357, 08-15359] — Counsel no longer with Perkins Coie (per phone conversation with firm). Assistant sent information with instructions on how to update ECF account. (ASW)
06/30/2010	70	Received notice from the Supreme Court. Petition for certiorari GRANTED on 06/28/2010. Supreme Court Number 09-115. [7390989] [07-17272, 07-17274, 08-15357, 08-15359, 08-15360] (GV)

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Case Number: 08-15359
Docketed: 02/20/2008

ARIZONA CONTRACTORS ASSOCIATION, INC.; ARIZONA EMPLOYERS FOR IMMIGRATION REFORM INC.; CHAMBER OF COMMERCE OF THE UNITED STATES; ARIZONA CHAMBER OF COMMERCE; ARIZONA HISPANIC CHAMBER OF COMMERCE INC.; ARIZONA FARM BUREAU FEDERATION; ARIZONA RESTAURANT AND HOSPITALITY ASSOCIATION; ASSOCIATED MINORITY CONTRACTORS OF AMERICA; ARIZONA ROOFING CONTRACTORS ASSOCIATION; NATIONAL ROOFING CONTRACTORS ASSOCIATION; ARIZONA LANDSCAPE CONTRACTOR ASSOCIATION; WAKE UP ARIZONA! INC,
Plaintiffs,

and

VALLE DEL SOL INC; CHICANOS POR LA CAUSA, INC.; SOMOS AMERICA,
Plaintiffs-Appellants,

v.

CRISS CANDELARIA; ED RHEINHEIMER; TERRENCE HANER; DAISY FLORES; KENNY ANGLE; DEREK D. RAPIER; MARTIN BRANNAN; ANDREW PEYTON THOMAS; MATTHEW J SMITH; JAMES CURRIER; BARBARA LAWALL; JAMES P WALSH; GEORGE SILVA; SHEILA POLK; JON SMITH; TERRY GODDARD; FIDELIS V GARCIA; GALE GARRIOTT; MELVIN R. BOWERS, JR.,
Defendants-Appellees.

DOCKET ENTRIES

DATE	NO.	PROCEEDINGS
02/20/2008	1	DOCKETED CAUSE AND ENTERED APPEARANCES OF COUNSEL. CADS SENT (Y/N): y. setting schedule as follows: CADS is past due; CADS must be filed no later than 2/27/08; appellant's designation of RT is due 2/19/08, ; appellee's designation of RT is due 2/28/08, ; appellant shall order transcript by 3/10/08, ; court reporter shall file transcript in DC by 4/9/08, ; certificate of record shall be filed by 4/16/08 ; appellant's opening brief is due 5/27/08, ; appellees' brief is due 6/25/08, ; appellants' reply brief is due 7/9/08, ; [08-15359] (KKW)
02/21/2008	2	Filed Aplts' Civil Appeals Docketing Statement served on 2/8/08 (to CON-FATT) [08-15359] [08-15359] (KKW)
02/21/2008	3	Filed Appellant AZ Contractors Ass. in 08-15357 emergency motion to for injunction served on 2/21/08 MOATT. (KKW)
02/21/2008	4	Filed Aplts in 08-15359 emergency motion to for injunction ; served on 2/21/08 MOATT. (KKW)
02/21/2008	5	Filed Appellant Valle Del Sol Inc in 08-15359's motion to file oversized emergency mtn served on 2/21/08 MOATT. [08-15357, 08-15359, 08-15360] (KKW)

DATE	NO.	PROCEEDINGS
02/21/2008	6	Filed Appellant Wake Up Arizona! Inc in 08-15360 joinder in emergency motion for injunction ; served on 2/21/08 MOATT. (KKW)
02/22/2008	7	Received copy of District Court order filed on 2/19/08 denying mtn for preliminary injunction. CASEFILE. [08-15357, 08-15359, 08-15360] (KKW)
02/22/2008	8	Filed Aplts AZ Contractors Ass. et al's Corporate Disclosure Statement. Served on 2/21/08 [08-15357, 08-15359, 08-15360] (KKW)
02/22/2008	11	Filed order MOATT (LN) The following briefing schedule govern these consolidated appeals: the consolidated opening briefs and excerpts of record are due March 31, 2008; the consolidated answering brief is due April 29, 2008; and the consolidated optional reply brief is due within 14 days after service of the answering brief. All parties on a side are encouraged to join in a single brief to the greatest extent practicable. The briefing schedule may be revised at a party's request following disposition of the pending emergency motions. [07-17272, 07-17274, 08-15357, 08-15359, 08-15360] (SW)
02/25/2008	9	Filed Andrew P Thomas motion to file consolidated response to emergency mtn in excess of 20 pages served on 2/25/08 MOATT. (KKW)

DATE	NO.	PROCEEDINGS
02/25/2008	10	Filed Appellee Andrew P Thomas response opposing emergency motion for injunction served on 2/25/08 MOATT. [08-15357, 08-15359, 08-15360] (KKW)
02/26/2008	12	Filed notice of joinder in State Defendants-Appellees' consolidated response to emergency mtns for injuction pending appeal served on 2/26/08 MOATT. (KKW)
02/26/2008	13	Filed joinder of Defendant James P. Walsh, Pinal County Attorney, to State Defendants-Appelles' consolidated response to emergency mtns for injunction pending appeal served on 2/26/08 MOATT. [08-15357, 08-15359, 08-15360] (KKW)
02/26/2008	14	Statement of Position of Ten County attorneys to state defendants' and Maricopa County's mtn for injunction pending appeal MOATT. [08-15357, 08-15359, 08-15360] (KKW)
02/26/2008	15	Filed Aplts' consolidated rpy in support of emergency mtns for injuction pending appeal ;served on 2/26/08 MOATT. [08-15357, 08-15359, 08-15360] (KKW)
02/26/2008	16	Filed notice of appearance of Roger W. Hall as attorney for Aples County Attorneys of Apache, Cochise, Gila, Graham, Greenlee, La Paz, Mohave, Navajo Santa Cruz and Yavapai Coun-

DATE	NO.	PROCEEDINGS
		ties. [08-15357, 08-15359, 08-15360] (KKW)
02/27/2008	17	Received Appellant notice of designation of reporter's transcript. [08-15357] (KKW)
02/27/2008	18	Received notice of joinder in State Defendants-Appellees' consolidated response to emergency mtns for injuction pending appeal MOATT. (KKW)
02/28/2008	19	Filed order (J. CLIFFORD WALLACE, EDWARD LEAVY and PAMELA ANN RYMER) Denying appellants' emergency motions for injunction pending appeal; Granting renewed motions of appellants Chicanos Por La Causa, Inc. and Wake Up Arizona!, Inc. for leave to file supplemental briefs in support of the emergency motion for injunction pending appeal; Granting Appellant Wake Up Arizona!, Inc.'s motion to join in the emergency motion filed by Arizona Contractors Association, Inc.; Granting the motions of appellees Andrew Thomas, Fidelis Garcia, Gale Garriott and Terry Goddard to file responses to the emergency motion in excess of 20 pages; Granting the various County Attorney appellees' motions to join in Mr. Thomas' response; Denying as moot all other pending motions. The previously-established briefing sche-

DATE	NO.	PROCEEDINGS
		dule remains in effect. (FAXED to parties on 2/28/08) (SS)
03/10/2008	20	Filed certificate of record on appeal. RT filed in DC 1.2.08, 1.24.08 [08-15357, 08-15359, 08-15360] (RC)
03/28/2008	21	Calendar check performed. [07-17272, 07-17274, 08-15357, 08-15359, 08-15360] (MW)
03/31/2008	25	Filed original and 15 copies of Appellants (Informal: No) Consolidated opening brief of 61 pages. Five copies Excerpts of record in 6 volumes. Served on 03/31/2008. [07-17272, 07-17274, 08-15357, 08-15359, 08-15360] (FT)
04/01/2008	22	(Amended) Received original and 15 copies of Appellants Substitute opening brief (Informal: No) 61 pages. Served on 04/01/2008. Deficiency: Other deficiencies: motion pending Notified counsel. [07-17272, 07-17274, 08-15357, 08-15359, 08-15360]—[Edited 04/07/2008 by BY]—[Edited 04/07/2008 by BY] (FT)
04/01/2008	23	Filed Appellants motion to file substitute or corrected brief (replacement). Served on 04/01/2008. [07-17272, 07-17274, 08-15357, 08-15359, 08-15360] (PANEL)—[Edited 04/16/2008 by BY] (FT)

DATE	NO.	PROCEEDINGS
04/02/2008	24	Received notice regarding proof of service. [07-17272, 07-17274, 08-15357, 08-15359, 08-15360] (RC)
04/07/2008	31	Received original and 15 copies of Amicus Curiae United States Hispanic Chamber of Commerce brief in 15 pages. Deficiency: Motion needed to file amicus brief. Served on. 04/07/2008 Notified counsel. [07-17272, 07-17274, 08-15357, 08-15359, 08-15360] (FT)
04/07/2008	33	Filed Amicus Curiae United States Hispanic Chamber of Commerce in 07-17272 motion for leave to file brief as amicus curiae. Served on 04/07/2008. [07-17272, 07-17274, 08-15357, 08-15359, 08-15360] (PANEL) (FT)
04/09/2008	26	Calendar materials being prepared. [07-17272, 07-17274, 08-15357, 08-15359, 08-15360] (AM)
04/09/2008	27	Received original and 15 copies of Amicus Curiae Lawyers Committee For Civil Rights of the San Francisco Bay Area brief in 21 pages. Deficiency: Motion pending Served on. 04/09/2008 [07-17272, 07-17274, 08-15357, 08-15359, 08-15360] (FT)
04/09/2008	28	Filed Amicus Curiae Lawyers Committee For Civil Rights of the San Francisco Bay Area in 07-17272, 07-17274, 08-15357, 08-15359, 08-15360 motion to file an amicus curiae brief,

DATE	NO.	PROCEEDINGS
		served on 04/09/2008 [07-17272, 07-17289, 07-17274, 08-15357, 08-15359, 08-15360] (PANEL)—[Edited 04/16/2008 by BY] (FT)
04/09/2008	29	Filed National Federation of Independent Business Small Business Legal Center motion to to become amicus curiae, served on 04/08/2008 [07-17272, 07-17274, 08-15357, 08-15359, 08-15360] (PANEL) (Motion is attached to brief)—[Edited 04/16/2008 by BY] (FT)
04/09/2008	30	Received original and 15 copies of Amicus Curiae National Federation of Independent Business Small Business Legal Center in 07-17272, 07-17274 brief in 27 pages. Deficiency: Motion pending Other deficiencies: (Font appears to be too small). Served on. 04/08/2008 . [07-17272, 07-17274, 08-15357, 08-15359, 08-15360] (FT)
04/14/2008	32	CALENDARED: 06/12/2008 9:00 AM San Francisco, CA Courtroom 1 (AM)
04/14/2008	34	Received original and 15 copies of Amicus Curiaes Oklahoma State Chamber of Commerce, Associated Industries Incorporated, Florida Chamber of Commerce and Tennessee Chamber of Commerce brief in 29 pages. Deficiency: Motion needed to file amicus brief. Served on. 04/09/2008 Notified counsel. [07-

DATE	NO.	PROCEEDINGS
		17272, 07-17274, 08-15357, 08-15359, 08-15360] (FT)
04/14/2008	36	Filed original and 15 copies of Florida Chamber of Commerce, Oklahoma State Chamber of Commerce and Tennessee Chamber of Commerce, etc amicus brief of 29 pages. Served on 04/09/2008 [07-17272, 07-17274, 08-15357, 08-15359, 08-15360] (PANEL) (FT)
04/17/2008	35	Filed appearance notice of Attorney(s) Omar C. Jadwat for party(s) - Chicanos Por La Causa, Inc. Valle Del Sol Inc - Somos America, in case 08-15360 Attorney(s) Omar C. Jadwat for party(s) Appellant CPLC Appellant Somos America, in case 07-17272 Attorney(s) Omar C. Jadwat for party(s) Appellant Chicanos Por La Causa, Inc. Appellant Somos America Valle Del Sol Inc, in case 08-15359 Attorney(s) Omar C. Jadwat for party(s) - Somos America - CPLC, in case 07-17274. Dated on "4/16/07". [07-17272, 07-17274, 08-15359, 08-15360] (RC)
04/25/2008	37	Hearing Notice for JUNE Calendar. Please return ACKNOWLEDGEMENT OF HEARING NOTICE form to: SAN FRANCISCO Office. Attention: The Notice of Docket Activity may not list your case number. Please open attached documents to view details about your case. [06-10529, 06-

DATE	NO.	PROCEEDINGS
		10733, 07-15921, 06-16189, 07-17272, 07-17274, 08-15357, 08-15359, 08-15360] (AM)
04/25/2008	38	Filed clerk order (Deputy Clerk:JF): The National Federation of Independent Business Small Business Legal Center and Associated Builders and Contractors, Inc.'s motion for leave to file an amicus brief is GRANTED. The United States Hispanic Chamber of Commerce's motion for leave to file brief as amicus curiae is GRANTED. The Lawyers' Committee for Civil Rights of the San Francisco Bay Area et al.'s motion for leave to file and amicus curiae brief is GRANTED. Plaintiff-Appellants' motion for leave to file replacement brief is GRANTED. All the briefs are ordered filed. [07-17272, 07-17274, 08-15357, 08-15359, 08-15360] (SC)
04/25/2008	39	Filed original and 15 copies of National Federation of Independent Business Small Business Legal Center in 07-17272 amicus brief of 27 pages. Served on 04/08/2008 [07-17272, 07-17289, 07-17274, 08-15359, 08-15360] (FT)
04/25/2008	40	(AMENDED) Filed original and 15 copies of Lawyers Committee For Civil Rights of the San Francisco Bay Area in 07-17272 amicus brief of 21 pages. Served on 04/09/2008 [07-17272, 07-

DATE	NO.	PROCEEDINGS
		17274, 08-15357, 08-15359, 08-15360] (PANEL)—[Edited 05/01/2008 by BY] (FT)
04/25/2008	49	Filed original and 15 copies of - Arizona Chamber of Commerce, Arizona Contractors Association, Arizona Employers for Immigration Reform Inc., Arizona Farm Bureau Federation, Arizona Hispanic Chamber of Commerce, Arizona Landscape Contractors' Association, Arizona Restaurant and Hospitality Association, Arizona Roofing Contractors Association, Associated Minority Contractors of America, Chamber of Commerce of the United States and National Roofing Contractors' Association in 07-17272 (Informal: No) substitutionOPENING brief of 61 pages. Served on 04/01/2008. [07-17272, 07-17274, 08-15357, 08-15359, 08-15360] (EXCERPTS ALREADY FILED WITH PREVIOUSLY FILED OPENING BRIEF) (FT)
04/25/2008	52	Filed original and 15 copies of United States Hispanic Chamber of Commerce's amicus brief, in support of aplts, of 15 pages. Served on 04/07/2008 [07-17272, 07-17274, 08-15357, 08-15359, 08-15360] (LA)
04/30/2008	41	(Amended) Filed original and 15 copies of Appellees Consolidated answering brief of 59 pages. Supplemental

DATE	NO.	PROCEEDINGS
		Excerpts of record in 1 volumes. Served on 04/29/2008. [07-17272, 07-17274, 08-15357, 08-15359, 08-15360] (PANEL)—[Edited 05/01/2008 by BY] (FT)
05/06/2008	43	Filed original and 15 copies of Amicus Curiae American Unity Legal Defense in 07-17272, Amicus Curiae American Unity Legal Defense in 07-17274, Amicus Curiae American Unity Legal Defense in 08-15357, Amicus Curiae American Unity Legal Defense in 08-15359 and Amicus Curiae American Unity Legal Defense in 08-15360 amicus brief of 33 pages. Served on 05/05/2008 [07-17272, 07-17274, 08-15357, 08-15359, 08-15360] (PANEL) (FT)
05/07/2008	42	Case rejected from Circuit Mediation Program. [08-15357, 08-15359, 08-15360] (BC)
05/12/2008	44	Filed clerk order (Deputy Clerk:pi): Granting Audio-Record Application from Capitol Media Services. [07-17272, 07-17274, 08-15357, 08-15359, 08-15360] (PA)
05/13/2008	45	Filed original and 15 copies of Appellants (Informal: No) reply brief of 27 pages. Further excerpts of record in1volumes. Served on 05/13/2008. [07-17272, 07-17274, 08-15357, 08-15359, 08-15360] (FT)

DATE	NO.	PROCEEDINGS
05/16/2008	46	Received Attorney Michael Jay Lessler, Esq. for Appellee Terrence Haner in 08-15357, 08-15359, 08-15360 letter dated 05/13/2008 re: Mr. Hance should be on the aple's consolidated answering brief. Served on [07-17272, 07-17274, 08-15357, 08-15359, 08-15360] (RC)
06/02/2008	47	UPDATED CASE CALENDARED: 06/12/2008 9:00 AM San Francisco, CA Courtroom 1 (AW)
06/05/2008	48	ENTRY UPDATED. Filed - Plaintiffs' additional citations. Served on 6/5/08. (panel) [07-17272, 07-17274, 08-15357, 08-15359, 08-15360] (RC)
06/11/2008	50	Filed Defendants' additional citations. Served on 06/10/2008. (panel) [07-17272, 07-17274, 08-15357, 08-15359, 08-15360] (RC)
06/12/2008	51	ARGUED AND SUBMITTED TO MARY M. SCHROEDER, JOHN WALKER, JR. and N. RANDY SMITH. [07-17272, 07-17274, 08-15357, 08-15359, 08-15360] (RT)
06/25/2008	53	Filed Plaintiffs/Appellants' additional citations. Served on 6/25/08. (panel) [07-17272, 07-17289, 07-17274, 08-15357, 08-15359, 08-15360] (RC)
07/03/2008	54	Filed Appellees' response to Plaintiffs' 6/25/08 additional citations. Served on 07/02/2008. (panel) [07-17272, 07-

DATE	NO.	PROCEEDINGS
		17274, 08-15357, 08-15359, 08-15360] (RC)
07/08/2008	55	Filed Amicus Curiae National Federation of Independent Business Small Business Legal Center in 07-17272 letter in support of appellants' 6/25/08 corrrespondence to the court. Served on 7/01/2008. (panel) [07-17272, 07-17274, 08-15357, 08-15359, 08-15360] (EL)
09/17/2008	56	FILED OPINION (MARY M. SCHROEDER, JOHN WALKER, JR. and N. RANDY SMITH) AFFIRMED. FILED AND ENTERED JUDGMENT. [07-17272, 07-17274, 08-15357, 08-15359, 08-15360] (RP)
10/01/2008	57	Filed original and 50 copies of Appellants' petition for panel rehearing and petition for rehearing en banc Number of Pages 19. Served on 10/01/2008. Deficiency: None. Date circulated to the court: 10/02/2008 (PANEL-ACTIVE JUDGES-ANY INTERESTED SENIOR JUDGES) [07-17272, 07-17274, 08-15357, 08 15359, 08 15360] (GV)
10/08/2008	59	Received original and 50 copies of Amici Curiae Lawyers Committee For Civil Rights of the San Francisco Bay Area , 11 pages. Deficiency: Motion pending . Served on 10/08/2008. (PANEL ALL ACTIVE JUDGES AND ALL INTERESTED SENIOR

DATE	NO.	PROCEEDINGS
		JUDGES) [07-17272, 07-17274, 08-15357, 08-15359, 08-15360] (GV)
10/09/2008	58	Filed Lawyers' Committee for Civil Rights of the San Francisco Bay Area's motion for leave to file an amicus curiae brief in support of Plas/Aplts' petition for rehearing; served on 10/8/08 (PANEL) [07-17272, 07-17274, 08-15357, 08-15359, 08-15360] (GV)
12/01/2008	60	Filed order (MARY M. SCHROEDER, JOHN WALKER, JR. and N. RANDY SMITH) Within 14 days from the date of this order, defendants-appellees are directed to file a response to the petition for rehearing and suggestion for rehearing en banc filed by plaintiffs-appellants on October 1, 2008. An original and 50 copies of the response shall be filed with the Clerk of Court, and shall not exceed 15 pages. [07-17272, 07-17274, 08-15357, 08-15359, 08-15360] (SC)
12/15/2008	61	Filed (ECF) Appellees Gale Garriott, Terry Goddard and Janet Napolitano in 07-17272, 07-17274, 07-17289, Appellees Fidelis V Garcia, Gale Garriott and Terry Goddard in 08-15357, Appellees Fidelis V Garcia and Terry Goddard in 08-15359, 08-15360 response to Order , Order to set response by any party to anything. Date of service: 12/15/2008. [6739637]. [07-

DATE	NO.	PROCEEDINGS
		17272, 07-17289, 07-17274, 08-15357, 08-15359, 08-15360] (CM)
12/17/2008	62	Electronically-filed document [61] Response to PFPR and/or PFREB (ECF Filing) is stricken because there is an error in the document. Document is not PDF. [07-17272, 07-17289, 07-17274, 08-15357, 08-15359, 08-15360] (LC)
12/18/2008	63	Filed (ECF) Appellees Gale Garriott, Terry Goddard and Janet Napolitano in 07-17272, 07-17274, 07-17289, Appellees Fidelis V Garcia, Gale Garriott and Terry Goddard in 08-15357, 08-15359, 08-15360 response to Order , Order to set response by any party to anything. Date of service: 12/15/2008. [6742812]. [07-17272, 07-17289, 07-17274, 08-15357, 08-15359, 08-15360] (MO)
12/24/2008	64	Submitted (ECF) Amicus brief for review and filed Motion to become amicus curiae. Submitted by Eagle Forum Education & Legal Defense Fund. Date of service: 12/24/2008. [6748544] [07-17272, 07-17289, 07-17274, 08-15357, 08-15359, 08-15360] (LJJ)
03/09/2009	65	Filed order and amended opinion (MARY M. SCHROEDER, JOHN WALKER, JR. and N. RANDY SMITH).The Opinion filed on September 17, 2008, and appearing at 544

DATE	NO.	PROCEEDINGS
		F.3d 976, is amended as follows: (see order for full text). With these amendments, the panel judges have voted to deny the petition for panel rehearing. Judges Schroeder and N.R. Smith have voted to deny the petition for rehearing en banc, and Judge Walker so recommends. The full court has been advised of the petition for rehearing en banc and no judge has requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 35. The petition for rehearing and petition for rehearing en banc are DENIED. No further petitions for rehearing or rehearing en banc will be accepted.[07-17272, 07-17274, 08-15357, 08-15359, 08-15360] (RP)
03/12/2009	66	Filed order (MARY M. SCHROEDER, JOHN WALKER, JR. and N. RANDY SMITH) Lawyers' Committee for Civil Rights of the San Francisco Bay Area's motion for leave to file an amicus curiae brief in support of Plaintiffs-Appellants' petition for rehearing is DENIED. The motion for leave to file amicus curiae brief of Eagle Forum Education & Legal Defense Fund in support of Defendants-Appellees for denial of petitions for rehearing is DENIED. [07-17272, 07-17274, 08-15357, 08-15359, 08-15360] (SC)

DATE	NO.	PROCEEDINGS
03/27/2009	67	MANDATE ISSUED.(MMS, JW and NRS) [07-17272, 07-17289, 07-17274, 08-15357, 08-15359, 08-15360] (GV)
06/09/2009	68	Received letter from the Supreme Court dated 06/02/2009 regarding extending time to file Cert to an including 7/24/98 [sic]. [07-17272, 07-17274, 08-15357, 08-15359, 08-15360] (GV)
08/07/2009	69	Received notice from the Supreme Court: petition for certiorari filed on 07/24/2009. Supreme Court Number 09-115. [7020681] [07-17272, 07-17274, 08-15357, 08-15359, 08-15360] (GV)
06/16/2010	70	Terminated Charles A. Blanchard for Wake Up Arizona! Inc in 08-15357, Wake Up Arizona! Inc in 08-15359 and Wake Up Arizona! Inc in 08-15360 [7373615] [08-15360, 07-17272, 07-17274, 08-15357, 08-15359] — Counsel no longer with Perkins Coie (per phone conversation with firm). Assistant sent information with instructions on how to update ECF account. (ASW)
06/30/2010	71	Received notice from the Supreme Court. Petition for certiorari GRANTED on 06/28/2010. Supreme Court Number 09-115. [7390989] [07-17272, 07-17274, 08-15357, 08-15359, 08-15360] (GV)

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Case Number: 08-15360
Docketed: 02/20/2008

ARIZONA CONTRACTORS ASSOCIATION, INC.; ARIZONA EMPLOYERS FOR IMMIGRATION REFORM INC.; CHAMBER OF COMMERCE OF THE UNITED STATES; ARIZONA CHAMBER OF COMMERCE; ARIZONA HISPANIC CHAMBER OF COMMERCE INC.; ARIZONA FARM BUREAU FEDERATION; ARIZONA RESTAURANT AND HOSPITALITY ASSOCIATION; ASSOCIATED MINORITY CONTRACTORS OF AMERICA; ARIZONA ROOFING CONTRACTORS ASSOCIATION; NATIONAL ROOFING CONTRACTORS ASSOCIATION; ARIZONA LANDSCAPE CONTRACTOR ASSOCIATION,

Plaintiffs,

VALLE DEL SOL INC; CHICANOS POR LA CAUSA, INC.; SOMOS AMERICA,

Plaintiffs,

and

WAKE UP ARIZONA! INC,

Plaintiff-Appellant,

v.

CRISS CANDELARIA; ED RHEINHEIMER; TERRENCE HANER; DAISY FLORES; KENNY ANGLE; DEREK D. RAPIER; MARTIN BRANNAN; ANDREW PEYTON THOMAS; MATTHEW J SMITH; JAMES CURRIER; BARBARA LAWALL; JAMES P WALSH; GEORGE SILVA; SHEILA POLK; JON SMITH; TERRY GODDARD; FIDELIS V GARCIA; GALE GARRIOTT; MELVIN R. BOWERS, JR.,

Defendants-Appellees.

DOCKET ENTRIES

DATE	NO.	PROCEEDINGS
02/20/2008	1	DOCKETED CAUSE AND ENTERED APPEARANCES OF COUNSEL. CADS SENT (Y/N): y. setting schedule as follows: CADS is past due; CADS must be filed no later than 2/27/08; appellant's designation of RT is due 2/19/08; appellee's designation of RT is due 2/28/08, ; appellant shall order transcript by 3/10/08; court reporter shall file transcript in DC by 4/9/08, ; certificate of record shall be filed by 4/16/08 ; appellant's opening brief is due 5/27/08; appellees' brief is due 6/25/08, ; appellants' reply brief is due 7/9/08; [08-15360] (KKW)
02/20/2008	2	Filed Charles A. Blanchard for Appellant Wake Up Arizona! Inc in 08-15360 Civil Appeals Docketing Statement served on 2/12/08 (to CONFATT) [08-15360] [08-15360] (JE)
02/20/2008	3	Filed statment of representation. (NAN) [08-15360] (JE)
02/20/2008	4	Notice rcv'd from Appellant Wake Up Arizona! Inc in 08-15360 re: transcripts. (NAN) (JE)
02/21/2008	5	Filed Appellant AZ Contractors Ass. in 08-15357 emergency motion to for injunction served on 2/21/08 MOATT. (KKW)
02/21/2008	6	Filed Aplts in 08-15359 emergency motion to for injunction ; served on 2/21/08 MOATT. (KKW)

DATE	NO.	PROCEEDINGS
02/21/2008	7	Filed Appellant Valle Del Sol Inc in 08-15359's motion to file oversized emergency mtn served on 2/21/08 MOATT. [08-15357, 08-15359, 08-15360] (KKW)
02/21/2008	8	Filed Appellant Wake Up Arizona! Inc in 08-15360 joinder in emergency motion for injunction ; served on 2/21/08 MOATT. (KKW)
02/22/2008	9	Received copy of District Court order filed on 2/19/08 denying mtn for preliminary injunction. CASEFILE. [08-15357, 08-15359, 08-15360] (KKW)
02/22/2008	10	Filed Aplts AZ Contractors Ass. et al's Corporate Disclosure Statement. Served on 2/21/08 [08-15357, 08-15359, 08-15360] (KKW)
02/22/2008	13	Filed order MOATT (LN) The following briefing schedule govern these consolidated appeals: the consolidated opening briefs and excerpts of record are due March 31, 2008; the consolidated answering brief is due April 29, 2008; and the consolidated optional reply brief is due within 14 days after service of the answering brief. All parties on a side are encouraged to join in a single brief to the greatest extent practicable. The briefing schedule may be revised at a party's request following disposition of the pending emer-

DATE	NO.	PROCEEDINGS
		gency motions. [07-17272, 07-17274, 08-15357, 08-15359, 08-15360] (SW)
02/25/2008	11	Filed Andrew P Thomas motion to file consolidated response to emergency mtn in excess of 20 pages served on 2/25/08 MOATT. (KKW)
02/25/2008	12	Filed Appellee Andrew P Thomas response opposing emergency motion for injunction served on 2/25/08 MOATT. [08-15357, 08-15359, 08-15360] (KKW)
02/26/2008	14	Filed notice of joinder in State Defendants-Appellees' consolidated response to emergency mtns for injuction pending appeal served on 2/26/08 MOATT. (KKW)
02/26/2008	15	Filed joinder of Defendant James P. Walsh, Pinal County Attorney, to State Defendants-Appelles' consolidated response to emergency mtns for injunction pending appeal served on 2/26/08 MOATT. [08-15357, 08-15359, 08-15360] (KKW)
02/26/2008	16	Statement of Position of Ten County attorneys to state defendants' and Maricopa County's mtn for injunction pending appeal MOATT. [08-15357, 08-15359, 08-15360] (KKW)
02/26/2008	17	Filed Aplts' consolidated rpy in support of emergency mtns for injuction pending appeal ;served on 2/26/08 MOATT. [08-15357, 08-15359, 08-15360] (KKW)

DATE	NO.	PROCEEDINGS
02/26/2008	18	Filed notice of appearance of Roger W. Hall as attorney for Aples County Attorneys of Apache, Cochise, Gila, Graham, Greenlee, La Paz, Mohave, Navajo Santa Cruz and Yavapai Counties. [08-15357, 08-15359, 08-15360] (KKW)
02/27/2008	19	Received Appellant notice of designation of reporter's transcript. [08-15357] (KKW)
02/27/2008	20	Received notice of joinder in State Defendants-Appellees' consolidated response to emergency mtns for injuction pending appeal MOATT. (KKW)
02/28/2008	21	Filed order (J. CLIFFORD WALLACE, EDWARD LEAVY and PAMELA ANN RYMER) Denying appellants' emergency motions for injunction pending appeal; Granting renewed motions of appellants Chicanos Por La Causa, Inc. and Wake Up Arizona!, Inc. for leave to file supplemental briefs in support of the emergency motion for injunction pending appeal; Granting Appellant Wake Up Arizona!, Inc.'s motion to join in the emergency motion filed by Arizona Contractors Association, Inc.; Granting the motions of appellees Andrew Thomas, Fidelis Garcia, Gale Garriott and Terry Goddard to file responses to the emergency motion in excess of 20 pages; Granting the various County

DATE	NO.	PROCEEDINGS
		Attorney appellees' motions to join in Mr. Thomas' response; Denying as moot all other pending motions. The previously-established briefing schedule remains in effect. (FAXED to parties on 2/28/08) (SS)
03/10/2008	22	Filed certificate of record on appeal. RT filed in DC 1.2.08, 1.24.08 [08-15357, 08-15359, 08-15360] (RC)
03/28/2008	23	Calendar check performed. [07-17272, 07-17274, 08-15357, 08-15359, 08-15360] (MW)
03/31/2008	27	Filed original and 15 copies of Appellants (Informal: No) Consolidated opening brief of 61 pages. Five copies Excerpts of record in 6 volumes. Served on 03/31/2008. [07-17272, 07-17274, 08-15357, 08-15359, 08-15360] (FT)
04/01/2008	24	(Amended) Received original and 15 copies of Appellants Substitute opening brief (Informal: No) 61 pages. Served on 04/01/2008. Deficiency: Other deficiencies: motion pending Notified counsel. [07-17272, 07-17274, 08-15357, 08-15359, 08-15360]—[Edited 04/07/2008 by BY]—[Edited 04/07/2008 by BY] (FT)
04/01/2008	25	Filed Appellants motion to file substitute or corrected brief (replacement). Served on 04/01/2008. [07-17272, 07-17274, 08-15357, 08-15359, 08-15360]

DATE	NO.	PROCEEDINGS
		(PANEL)—[Edited 04/16/2008 by BY] (FT)
04/02/2008	26	Received notice regarding proof of service. [07-17272, 07-17274, 08-15357, 08-15359, 08-15360] (RC)
04/07/2008	33	Received original and 15 copies of Amicus Curiae United States Hispanic Chamber of Commerce brief in 15 pages. Deficiency: Motion needed to file amicus brief. Served on. 04/07/2008 Notified counsel. [07-17272, 07-17274, 08-15357, 08-15359, 08-15360] (FT)
04/07/2008	35	Filed Amicus Curiae United States Hispanic Chamber of Commerce in 07-17272 motion for leave to file brief as amicus curiae. Served on 04/07/2008. [07-17272, 07-17274, 08-15357, 08-15359, 08-15360] (PANEL) (FT)
04/09/2008	28	Calendar materials being prepared. [07-17272, 07-17274, 08-15357, 08-15359, 08-15360] (AM)
04/09/2008	29	Received original and 15 copies of Amicus Curiae Lawyers Committee For Civil Rights of the San Francisco Bay Area brief in 21 pages. Deficiency: Motion pending Served on. 04/09/2008 [07-17272, 07-17274, 08-15357, 08-15359, 08-15360] (FT)
04/09/2008	30	Filed Amicus Curiae Lawyers Committee For Civil Rights of the San Francisco Bay Area in 07-17272, 07-

DATE	NO.	PROCEEDINGS
		17274, 08-15357, 08-15359, 08-15360 motion to file an amicus curiae brief, served on 04/09/2008 [07-17272, 07-17289, 07-17274, 08-15357, 08-15359, 08-15360] (PANEL)—[Edited 04/16/2008 by BY] (FT)
04/09/2008	31	Filed National Federation of Independent Business Small Business Legal Center motion to to become amicus curiae, served on 04/08/2008 [07-17272, 07-17274, 08-15357, 08-15359, 08-15360] (PANEL) (Motion is attached to brief)—[Edited 04/16/2008 by BY] (FT)
04/09/2008	32	Received original and 15 copies of Amicus Curiae National Federation of Independent Business Small Business Legal Center in 07-17272, 07-17274 brief in 27 pages. Deficiency: Motion pending Other deficiencies: (Font appears to be too small). Served on. 04/08/2008 . [07-17272, 07-17274, 08-15357, 08-15359, 08-15360] (FT)
04/14/2008	34	CALENDARED: 06/12/2008 9:00 AM San Francisco, CA Courtroom 1 (AM)
04/14/2008	36	Received original and 15 copies of Amicus Curiaes Oklahoma State Chamber of Commerce, Associated Industries Incorporated, Florida Chamber of Commerce and Tennessee Chamber of Commerce brief in 29 pages. Deficiency: Motion needed to

DATE	NO.	PROCEEDINGS
		file amicus brief. Served on. 04/09/2008 Notified counsel. [07-17272, 07-17274, 08-15357, 08-15359, 08-15360] (FT)
04/14/2008	38	Filed original and 15 copies of Florida Chamber of Commerce, Oklahoma State Chamber of Commerce and Tennessee Chamber of Commerce, etc amicus brief of 29 pages. Served on 04/09/2008 [07-17272, 07-17274, 08-15357, 08-15359, 08-15360] (PANEL) (FT)
04/17/2008	37	Filed appearance notice of Attorney(s) Omar C. Jadwat for party(s) - Chicanos Por La Causa, Inc. Valle Del Sol Inc - Somos America, in case 08-15360 Attorney(s) Omar C. Jadwat for party(s) Appellant CPLC Appellant Somos America, in case 07-17272 Attorney(s) Omar C. Jadwat for party(s) Appellant Chicanos Por La Causa, Inc. Appellant Somos America Valle Del Sol Inc, in case 08-15359 Attorney(s) Omar C. Jadwat for party(s) - Somos America - CPLC, in case 07-17274. Dated on "4/16/07". [07-17272, 07-17274, 08-15359, 08-15360] (RC)
04/25/2008	39	Hearing Notice for JUNE Calendar. Please return ACKNOWLEDGEMENT OF HEARING NOTICE form to: SAN FRANCISCO Office. Attention: The Notice of Docket Activity may not list your case number. Please open attached documents to view de-

DATE	NO.	PROCEEDINGS
		tails about your case. [06-10529, 06-10733, 07-15921, 06 16189, 07-17272, 07-17274, 08-15357, 08-15359, 08-15360] (AM)
04/25/2008	40	Filed clerk order (Deputy Clerk:JF): The National Federation of Independent Business Small Business Legal Center and Associated Builders and Contractors, Inc.'s motion for leave to file an amicus brief is GRANTED. The United States Hispanic Chamber of Commerce's motion for leave to file brief as amicus curiae is GRANTED. The Lawyers' Committee for Civil Rights of the San Francisco Bay Area et al.'s motion for leave to file and amicus curiae brief is GRANTED. Plaintiff-Appellants' motion for leave to file replacement brief is GRANTED. All the briefs are ordered filed. [07-17272, 07-17274, 08-15357, 08-15359, 08-15360] (SC)
04/25/2008	41	Filed original and 15 copies of National Federation of Independent Business Small Business Legal Center in 07-17272 amicus brief of 27 pages. Served on 04/08/2008 [07-17272, 07-17289, 07-17274, 08-15359, 08-15360] (FT)
04/25/2008	42	(AMENDED) Filed original and 15 copies of Lawyers Committee For Civil Rights of the San Francisco Bay Area in 07-17272 amicus brief of 21 pages.

DATE	NO.	PROCEEDINGS
		Served on 04/09/2008 [07-17272, 07-17274, 08-15357, 08-15359, 08-15360] (PANEL)—[Edited 05/01/2008 by BY] (FT)
04/25/2008	51	Filed original and 15 copies of - Arizona Chamber of Commerce, Arizona Contractors Association, Arizona Employers for Immigration Reform Inc., Arizona Farm Bureau Federation, Arizona Hispanic Chamber of Commerce, Arizona Landscape Contractors' Association, Arizona Restaurant and Hospitality Association, Arizona Roofing Contractors Association, Associated Minority Contractors of America, Chamber of Commerce of the United States and National Roofing Contractors' Association in 07-17272 (Informal: No) substitutionOPENING brief of 61 pages. Served on 04/01/2008. [07-17272, 07-17274, 08-15357, 08-15359, 08-15360] (EXCERPTS ALREADY FILED WITH PREVIOUSLY FILED OPENING BRIEF) (FT)
04/25/2008	54	Filed original and 15 copies of United States Hispanic Chamber of Commerce's amicus brief, in support of aplts, of 15 pages. Served on 04/07/2008 [07-17272, 07-17274, 08-15357, 08-15359, 08-15360] (LA)
04/30/2008	43	(Amended) Filed original and 15 copies of Appellees Consolidated answering brief of 59 pages. Supplemental

DATE	NO.	PROCEEDINGS
		Excerpts of record in 1 volumes. Served on 04/29/2008. [07-17272, 07-17274, 08-15357, 08-15359, 08-15360] (PANEL)—[Edited 05/01/2008 by BY] (FT)
05/06/2008	45	Filed original and 15 copies of Amicus Curiae American Unity Legal Defense in 07-17272, Amicus Curiae American Unity Legal Defense in 07-17274, Amicus Curiae American Unity Legal Defense in 08-15357, Amicus Curiae American Unity Legal Defense in 08-15359 and Amicus Curiae American Unity Legal Defense in 08-15360 amicus brief of 33 pages. Served on 05/05/2008 [07-17272, 07-17274, 08-15357, 08-15359, 08-15360] (PANEL) (FT)
05/07/2008	44	Case rejected from Circuit Mediation Program. [08-15357, 08-15359, 08-15360] (BC)
05/12/2008	46	Filed clerk order (Deputy Clerk:pi): Granting Audio-Record Application from Capitol Media Services. [07-17272, 07-17274, 08-15357, 08-15359, 08-15360] (PA)
05/13/2008	47	Filed original and 15 copies of Appellants (Informal: No) reply brief of 27 pages. Further excerpts of record in1volumes. Served on 05/13/2008. [07-17272, 07-17274, 08-15357, 08-15359, 08-15360] (FT)

DATE	NO.	PROCEEDINGS
05/16/2008	48	Received Attorney Michael Jay Lessler, Esq. for Appellee Terrence Haner in 08-15357, 08-15359, 08-15360 letter dated 05/13/2008 re: Mr. Hance should be on the aple's consolidated answering brief. Served on [07-17272, 07-17274, 08-15357, 08-15359, 08-15360] (RC)
06/02/2008	49	UPDATED CASE CALENDARED: 06/12/2008 9:00 AM San Francisco, CA Courtroom 1 (AW)
06/05/2008	50	ENTRY UPDATED. Filed - Plaintiffs' additional citations. Served on 6/5/08. (panel) [07-17272, 07-17274, 08-15357, 08-15359, 08-15360] (RC)
06/11/2008	52	Filed Defendants' additional citations. Served on 06/10/2008. (panel) [07-17272, 07-17274, 08-15357, 08-15359, 08-15360] (RC)
06/12/2008	53	ARGUED AND SUBMITTED TO MARY M. SCHROEDER, JOHN WALKER, JR. and N. RANDY SMITH. [07-17272, 07-17274, 08-15357, 08-15359, 08-15360] (RT)
06/25/2008	55	Filed Plaintiffs/Appellants' additional citations. Served on 6/25/08. (panel) [07-17272, 07-17289, 07-17274, 08-15357, 08-15359, 08-15360] (RC)
07/03/2008	56	Filed Appellees' response to Plaintiffs' 6/25/08 additional citations. Served on 07/02/2008. (panel) [07-17272, 07-

DATE	NO.	PROCEEDINGS
		17274, 08-15357, 08-15359, 08-15360] (RC)
07/08/2008	57	Filed Amicus Curiae National Federation of Independent Business Small Business Legal Center in 07-17272 letter in support of appellants' 6/25/08 corrrespondence to the court. Served on 7/01/2008. (panel) [07-17272, 07-17274, 08-15357, 08-15359, 08-15360] (EL)
09/17/2008	58	FILED OPINION (MARY M. SCHROEDER, JOHN WALKER, JR. and N. RANDY SMITH) AFFIRMED. FILED AND ENTERED JUDGMENT. [07-17272, 07-17274, 08-15357, 08-15359, 08-15360] (RP)
10/01/2008	59	Filed original and 50 copies of Appellants' petition for panel rehearing and petition for rehearing en banc Number of Pages 19. Served on 10/01/2008. Deficiency: None. Date circulated to the court: 10/02/2008 (PANEL-ACTIVE JUDGES-ANY INTERESTED SENIOR JUDGES) [07-17272, 07-17274, 08-15357, 08-15359, 08-15360] (GV)
10/08/2008	61	Received original and 50 copies of Amici Curiae Lawyers Committee For Civil Rights of the San Francisco Bay Area , 11 pages. Deficiency: Motion pending . Served on 10/08/2008. (PANEL ALL ACTIVE JUDGES AND ALL INTERESTED SENIOR

DATE	NO.	PROCEEDINGS
		JUDGES) [07-17272, 07-17274, 08-15357, 08-15359, 08-15360] (GV)
10/09/2008	60	Filed Lawyers' Committee for Civil Rights of the San Francisco Bay Area's motion for leave to file an amicus curiae brief in support of Plas/Aplts' petition for rehearing; served on 10/8/08 (PANEL) [07-17272, 07-17274, 08-15357, 08-15359, 08-15360] (GV)
12/01/2008	62	Filed order (MARY M. SCHROEDER, JOHN WALKER, JR. and N. RANDY SMITH) Within 14 days from the date of this order, defendants-appellees are directed to file a response to the petition for rehearing and suggestion for rehearing en banc filed by plaintiffs-appellants on October 1, 2008. An original and 50 copies of the response shall be filed with the Clerk of Court, and shall not exceed 15 pages. [07-17272, 07-17274, 08-15357, 08-15359, 08-15360] (SC)
12/15/2008	63	Filed (ECF) Appellees Gale Garriott, Terry Goddard and Janet Napolitano in 07-17272, 07-17274, 07-17289, Appellees Fidelis V Garcia, Gale Garriott and Terry Goddard in 08-15357, Appellees Fidelis V Garcia and Terry Goddard in 08-15359, 08-15360 response to Order , Order to set response by any party to anything. Date of service: 12/15/2008. [6739637]. [07-

DATE	NO.	PROCEEDINGS
		17272, 07-17289, 07-17274, 08-15357, 08-15359, 08-15360] (CM)
12/17/2008	64	Electronically-filed document [63] Response to PFPR and/or PFREB (ECF Filing) is stricken because there is an error in the document. Document is not PDF. [07-17272, 07-17289, 07-17274, 08-15357, 08-15359, 08-15360] (LC)
12/18/2008	65	Filed (ECF) Appellees Gale Garriott, Terry Goddard and Janet Napolitano in 07-17272, 07-17274, 07-17289, Appellees Fidelis V Garcia, Gale Garriott and Terry Goddard in 08-15357, 08-15359, 08-15360 response to Order , Order to set response by any party to anything. Date of service: 12/15/2008. [6742812]. [07-17272, 07-17289, 07-17274, 08-15357, 08-15359, 08-15360] (MO)
12/24/2008	66	Submitted (ECF) Amicus brief for review and filed Motion to become amicus curiae. Submitted by Eagle Forum Education & Legal Defense Fund. Date of service: 12/24/2008. [6748544] [07-17272, 07-17289, 07-17274, 08-15357, 08-15359, 08-15360] (LJJ)
03/09/2009	67	Filed order and amended opinion (MARY M. SCHROEDER, JOHN WALKER, JR. and N. RANDY SMITH).The Opinion filed on September 17, 2008, and appearing at 544

DATE	NO.	PROCEEDINGS
		F.3d 976, is amended as follows: (see order for full text). With these amendments, the panel judges have voted to deny the petition for panel rehearing. Judges Schroeder and N.R. Smith have voted to deny the petition for rehearing en banc, and Judge Walker so recommends. The full court has been advised of the petition for rehearing en banc and no judge has requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 35. The petition for rehearing and petition for rehearing en banc are DENIED. No further petitions for rehearing or rehearing en banc will be accepted.[07-17272, 07-17274, 08-15357, 08-15359, 08-15360] (RP)
03/12/2009	68	Filed order (MARY M. SCHROEDER, JOHN WALKER, JR. and N. RANDY SMITH) Lawyers' Committee for Civil Rights of the San Francisco Bay Area's motion for leave to file an amicus curiae brief in support of Plaintiffs-Appellants' petition for rehearing is DENIED. The motion for leave to file amicus curiae brief of Eagle Forum Education & Legal Defense Fund in support of Defendants-Appellees for denial of petitions for rehearing is DENIED. [07-17272, 07-17274, 08-15357, 08-15359, 08-15360] (SC)

DATE	NO.	PROCEEDINGS
03/27/2009	69	MANDATE ISSUED.(MMS, JW and NRS) [07-17272, 07-17289, 07-17274, 08-15357, 08-15359, 08-15360] (GV)
06/09/2009	70	Received letter from the Supreme Court dated 06/02/2009 regarding extending time to file Cert to an including 7/24/98 [sic]. [07-17272, 07-17274, 08-15357, 08-15359, 08-15360] (GV)
08/07/2009	71	Received notice from the Supreme Court: petition for certiorari filed on 07/24/2009. Supreme Court Number 09-115. [7020681] [07-17272, 07-17274, 08-15357, 08-15359, 08-15360] (GV)
06/16/2010	72	Terminated Charles A. Blanchard for Wake Up Arizona! Inc in 08-15357, Wake Up Arizona! Inc in 08-15359 and Wake Up Arizona! Inc in 08-15360 [7373615] [08-15360, 07-17272, 07-17274, 08-15357, 08-15359] — Counsel no longer with Perkins Coie (per phone conversation with firm). Assistant sent information with instructions on how to update ECF account. (ASW)
06/30/2010	73	Received notice from the Supreme Court. Petition for certiorari GRANTED on 06/28/2010. Supreme Court Number 09-115. [7390989] [07-17272, 07-17274, 08-15357, 08-15359, 08-15360] (GV)

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

Case No. CV 07-1355-PHX-NVW

ARIZONA CONTRACTORS ASSOCIATION, INC., an Arizona non-profit corporation, ARIZONA EMPLOYERS FOR IMMIGRATION REFORM, INC., an Arizona non-profit corporation, CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA, a Washington D.C. non-profit corporation, ARIZONA CHAMBER OF COMMERCE, an Arizona non-profit corporation, ARIZONA HISPANIC CHAMBER OF COMMERCE, INC., an Arizona non-profit corporation, ARIZONA FARM BUREAU FEDERATION, an Arizona non-profit corporation, ARIZONA RESTAURANT AND HOSPITALITY ASSOCIATION, an Arizona non-profit corporation, ASSOCIATED MINORITY CONTRACTORS OF AMERICA, an Arizona non-profit limited liability company; ARIZONA ROOFING CONTRACTORS ASSOCIATION, an Arizona non-profit corporation, NATIONAL ROOFING CONTRACTORS' ASSOCIATION, an Illinois not-for-profit corporation, WAKE UP ARIZONA! INC., an Arizona non-profit corporation, and ARIZONA LANDSCAPE CONTRACTORS ASSOCIATION, INC., an Arizona non-profit corporation.

Plaintiffs,

v.

JANET NAPOLITANO, Governor of the State of Arizona and TERRY GODDARD, Attorney General of the State of Arizona

Defendants.

SECOND AMENDED COMPLAINT

1. Violation of Procedural Due Process under U.S. Constitution
2. Violation of Procedural Due Process under Arizona Constitution
3. Violation of Substantive Due Process under U.S. Constitution
4. Violation of Substantive Due Process under Arizona Constitution
5. Violation of Commerce Clause of U.S. Constitution
6. Violation of Supremacy Clause of U.S. Constitution/Federal Pre-Emption
7. Violation of Separation of Powers of Arizona Constitution
8. Violation of Fourth Amendment of U.S. Constitution

For their Complaint against the Honorable Janet Napolitano, Governor of the State of Arizona, and the Honorable Terry Goddard, Attorney General of the State of Arizona, (the "State"), Plaintiffs the Arizona Contractors Association, Inc. ("Arizona Contractors Association"), Arizona Employers for Immigration Reform, Inc. ("AZEIR"), Chamber of Commerce of the United States of America ("U.S. Chamber of Commerce"), Arizona Chamber of Commerce, Arizona Hispanic Chamber of Commerce, Inc. ("Arizona Hispanic Chamber of Commerce"), Arizona Farm Bureau Federation ("Arizona Farm Bureau"), Arizona Restaurant and Hospitality Association, Associated Minority Contractors of America ("Associated Minority Contractors"), Arizona Roofing Contractors Association, the National Roofing Contractors' Association

("National Roofing Contractors' Association"), Wake Up Arizona! Inc. ("Wake Up Arizona!", and the Arizona Landscape Contractors Association, Inc. ("Arizona Landscaping Contractors Association"), (hereinafter collectively referred to as "Plaintiffs") allege as follows:

SUMMARY

1. Plaintiffs bring this case to uphold and to prevent violations of the Constitution of the United States, the laws of the United States, and the Constitution of the State of Arizona.

2. On July 2, 2007, the Honorable Janet Napolitano, the Governor of Arizona, signed into law HB 2779, a bill passed by the Arizona Legislature on June 20, 2007 (hereinafter referred to as "HB 2779").

3. HB 2779 violates the United States and Arizona Constitutions and is pre-empted by federal law.

4. HB 2779 deprives Plaintiffs and others of property without due process of law. It deprives Plaintiffs of fundamental rights guaranteed by the United States and Arizona Constitutions.

5. HB 2779 regulates and interferes with interstate commerce.

6. HB 2779 violates the Supremacy Clause because it conflicts with and is preempted by federal law.

7. HB 2779 violates the separation of powers doctrine of the Arizona Constitution.

8. Plaintiffs seek and are entitled to a declaratory judgment and a preliminary and permanent injunction to declare HB 2779 unconstitutional and illegal and to enjoin the Governor and the Attorney General from enforcing HB 2779.

PARTIES, JURISDICTION AND VENUE.

9. Plaintiff the Arizona Contractors Association is a non profit corporation incorporated under the laws of the State of Arizona, with its principal place of business located in the State of Arizona.

10. The Arizona Contractors Association is an employer that employs employees in the State of Arizona. It transacts business in Arizona and holds what are deemed to be licenses under HB 2779.

11. The Arizona Contractors Association is an association of members ("Arizona Contractors Association Members"). Arizona Contractors Association Members employ employees in the State of Arizona, transact business in Arizona, and hold licenses and permits from the State and/or its political subdivisions.

12. The Arizona Contractors Association serves as a public policy advocate on behalf of its members and urges the Arizona Legislature and Executive Branch agencies to adopt and implement policies that promote a favorable legal and business climate in Arizona for the benefit of its members.

13. Plaintiff AZEIR is a non profit corporation incorporated under the laws of the State of Arizona, with its principal place of business located in the State of Arizona.

14. AZEIR is an association of members ("AZEIR Members"). AZEIR Members employ employees in the State of Arizona, transact business in Arizona, and hold licenses and permits from the State and/or its political subdivisions.

15. AZEIR serves as a public policy advocate on behalf of its members and urges the Arizona Legisla-

ture and Executive Branch agencies to adopt and implement policies that promote a favorable legal and business climate in Arizona for the benefit of its members.

16. Plaintiff the U.S. Chamber of Commerce is a non profit corporation incorporated under the laws of the District of Columbia with its principal place of business located in Washington D.C.

17. The U.S. Chamber of Commerce is the world's largest federation of businesses, professional organizations, and state and local chambers of commerce. The U.S. Chamber of Commerce represents an underlying membership of more than three million businesses and organizations of every size in every industrial sector and geographic region of the country, including Arizona, and its members transact business in Arizona and hold what are deemed to be licenses under HB 2779.

18. The U.S. Chamber of Commerce membership includes associations, chambers of commerce and direct business members. The U. S. Chamber of Commerce serves as a public policy advocate on behalf of its members. It advocates the interests of the business community, including advocating the interests of its members in courts across the nation in cases involving issues of national concern to American businesses.

19. The U.S. Chamber of Commerce has also been involved heavily in efforts to seek to achieve federal immigration legislation and laws that are uniform, fair, and appropriate to the needs of businesses.

20. Plaintiff the Arizona Chamber of Commerce is a non profit corporation incorporated under the laws

of the State of Arizona, with its principal place of business located in the State of Arizona.

21. The Arizona Chamber of Commerce employ employees in the State of Arizona, transact business in Arizona, and holds what are deemed to be licenses under HB 2779.

22. The Arizona Chamber of Commerce is an association of members ("Arizona Chamber of Commerce Members"). Arizona Chamber of Commerce Members employ employees I [sic] the State of Arizona, transact business in Arizona, and hold licenses and permits from the State an/or its political subdivision.

23. Arizona Chamber of Commerce Members employ employees in the State of Arizona, transact business in Arizona, and hold licenses and permits from the State and/or its political subdivisions.

24. The Arizona Chamber of Commerce serves as a public policy advocate on behalf of its members and urges the Arizona Legislature and Executive Branch agencies to adopt and implement policies that promote a favorable legal and business climate in Arizona for the benefit of its members.

25. Plaintiff the Arizona Hispanic Chamber of Commerce is a non profit corporation incorporated under the laws of the State of Arizona, with its principal place of business located in the State of Arizona.

26. The Arizona Hispanic Chamber of Commerce is an employer that employs employees in the State of Arizona. It transacts business in Arizona and holds what are deemed to be licenses under HB 2779.

27. The Arizona Hispanic Chamber of Commerce is an association of members ("Arizona Hispanic Chamber

of Commerce Members"). Arizona Hispanic Chamber of Commerce Members employ employees in the State of Arizona, transact business in Arizona, and hold licenses and permits from the State and/or its political subdivisions.

28. The Arizona Hispanic Chamber of Commerce serves as a public policy advocate on behalf of its members and urges the Arizona Legislature and Executive Branch agencies to adopt and implement policies that promote a favorable legal and business climate in Arizona for the benefit of its members.

29. Plaintiff the Arizona Farm in Bureau is a non profit corporation incorporated under the laws of the State of Arizona, with its principal place of business located in the State of Arizona.

30. The Arizona Farm Bureau is an employer that employs employees in the State of Arizona. It transacts business in Arizona and holds what are deemed to be licenses under HB 2779.

31. The Arizona Farm Bureau is an association of members ("Arizona Farm Bureau Members"). Arizona Farm Bureau members employ employees in the State of Arizona, transact business in Arizona, and hold licenses and permits from the State and/or its political subdivisions.

32. The Arizona Farm Bureau serves as a public policy advocate on behalf of its members and urges the Arizona Legislature and Executive Branch agencies to adopt and implement policies that promote a favorable legal and business climate in Arizona for the benefit of its members.

33. Plaintiff the Arizona Restaurant and Hospitality Association is a non profit corporation

incorporated under the laws of the State of Arizona, with its principal place of business located in the State of Arizona.

34. The Arizona Restaurant and Hospitality Association is an employer that employs employees in the State of Arizona. It transacts business in Arizona and holds what are deemed to be licenses under HB 2779.

35. The Arizona Restaurant and Hospitality Association is an association of members ("Arizona Restaurant and Hospitality Association Members"). The Arizona Restaurant and Hospitality Association Members employ employees in the State of Arizona, transact business in Arizona, and hold licenses and permits from the State and/or its political subdivisions.

36. The Arizona Restaurant and Hospitality Association serves as a public policy advocate on behalf of its members and urges the Arizona Legislature and Executive Branch agencies to adopt and implement policies that promote a favorable legal and business climate in Arizona for the benefit of its members.

37. Plaintiff the Associated Minority Contractors is a non profit corporation incorporated under the laws of the State of Arizona, with its principal place of business located in the State of Arizona.

38. Associated Minority Contractors is an employer that employs employees in the State of Arizona. It transacts business in Arizona and holds what are deemed to be licenses under HB 2779.

39. Associated Minority Contractors is an association of members ("Associated Minority Contractors Members"). Associated Minority Contractors Members employ employees in the State of Arizona, transact

business in Arizona, and hold licenses and permits from the State and/or its political subdivisions.

40. Associated Minority Contractors serves as a public policy advocate on behalf of its members and urges the Arizona Legislature and Executive Branch agencies to adopt and implement policies that promote a favorable legal and business climate in Arizona for the benefit of its members.

41. Plaintiff the Arizona Roofing Contractors Association is a non profit corporation incorporated under the laws of the State of Arizona, with its principal place of business located in the State of Arizona.

42. The Arizona Roofing Contractors Association is an employer that employs employees in the State of Arizona. It transacts business in Arizona and holds what are deemed to be licenses under HB 2779.

43. The Arizona Roofing Contractors Association is an association of members ("Arizona Roofing Contractors Association Members"). Arizona Roofing Contractors Association Members employ employees in the State of Arizona, transact business in Arizona, and hold licenses and permits from the State and/or its political subdivisions.

44. The Arizona Roofing Contractors Association serves as a public policy advocate on behalf of its members and urges the Arizona Legislature and Executive Branch agencies to adopt and implement policies that promote a favorable legal and business climate in Arizona for the benefit of its members.

45. Plaintiff the National Roofing Contractors' Association is a not for profit corporation incorporated under the laws of the State of Illinois, with its principal place of business located in the State of Illinois.

46. The National Roofing Contractors' Association is an association of roofing, roof deck, and waterproofing contactors, industry-related associate members, including manufacturers, distributors, architects, engineers, and others. The National Roofing Contractors' Association has more than 4,600 members from all 50 states and 54 countries and is affiliated with 105 local, state, regional and international roofing contractor associates. Its members transact business in Arizona and hold what are deemed to be licenses under HB 2779.

47. The National Roofing Contractors' Association serves as a public policy advocate on behalf of its members.

48. Plaintiff Wake Up Arizona! is a non profit corporation incorporated under the laws of the State of Arizona, with its principal place of business located in the State of Arizona.

49. Wake Up Arizona! Transacts [sic] business in Arizona and holds what are deemed to be licenses under HB 2779.

50. Wake Up Arizona! is an association of members ("Wake Up Arizona! Members"). Wake Up Arizona! Members employ employees in the State of Arizona, transact business in Arizona, and hold licenses and permits from the State and/or its political subdivisions.

51. Wake Up Arizona! serves as a public policy advocate on behalf of its members and urges the Arizona Legislature and Executive Branch agencies to adopt and implement policies that promote a favorable legal and business climate in Arizona for the benefit of its members.

52. Plaintiff the Arizona Landscape Contractors Association is a non profit corporation incorporated under the laws of the State of Arizona, with its principal place of business located in the State of Arizona.

53. The Arizona Landscape Contractors Association is an employer that employs employees in the State of Arizona. It transacts business in Arizona and holds what are deemed to be licenses under HB 2779.

54. The Arizona Landscape Contractors Association is an association of members ("Arizona Landscape Contractors Association Members"). The Arizona Landscape Contractors Association Members employ employees in the State of Arizona, transact business in Arizona, and hold licenses and permits from the State and/or its political subdivisions.

55. The Arizona Landscape Contractors Association serves as a public policy advocate on behalf of its members and urges the Arizona Legislature and Executive Branch agencies to adopt and implement policies that promote a favorable legal and business climate in Arizona for the benefit of its members.

56. Defendant Janet Napolitano is the Governor of the State of Arizona (the "Governor"). She is named herein as a Defendant in her capacity as Governor.

57. Defendant Terry Goddard is the Attorney General of the State of Arizona (the "Attorney General"). He is named herein as a Defendant in his capacity as Attorney General.

58. Each Plaintiff and the members of each Plaintiff are affected by the actions of the State of Arizona in enacting into law HB 2779, to be codified at Title 23, Chapter 2, Article 2, of the Arizona Revised Statutes.

59. Each Plaintiff has standing to sue in this action.

60. The Due Process, Commerce Clause, and Supremacy/Preemption claims of Plaintiffs arise under the Constitution and laws of the United States. As a result, Plaintiffs have a right to sue arising under 42 U.S.C. § 1983.

61. This Court has jurisdiction over the Due Process, Commerce Clause and Supremacy Clause/ Preemption claims of Plaintiffs pursuant to 28 U.S.C. §§ 1331 and 1343 because they arise under the Constitution and laws of the United States.

62. This Court has jurisdiction over the Plaintiffs' state law claims pursuant to 28 U.S.C. § 1367.

63. Venue is proper in this Court pursuant to 28 U.S.C. § 1391(b).

64. Pursuant to 28 U.S.C. §§ 2201-2202, the Court may issue a declaratory judgment and further necessary or proper relief.

ALLEGATIONS COMMON TO ALL CLAIMS

65. On July 2, 2007, the Honorable Janet Napolitano, the Governor of Arizona, signed into law HB 2779, a bill passed by the Arizona Legislature on June 20, 2007.

66. HB 2779 prohibits employers from "knowingly" or "intentionally" employing an unauthorized alien.

67. HB 2779 requires the Arizona Attorney General and the County Attorneys of the several counties in Arizona to investigate all complaints that an employer is knowingly or intentionally employing an unauthorized alien.

68. HB 2779 requires County Attorneys to prosecute all complaints that are considered to be "not frivolous."

69. When investigating complaints pursuant to HB 2779, the County Attorneys or the Attorney General must verify an individual's work authorization exclusively by communicating with the federal government pursuant to 8 U.S.C. § 1373(c).

70. Under HB 2779, effective January 1, 2008, employers that are deemed to have "knowingly" or "intentionally" hired unauthorized aliens may have their business licenses suspended for a first violation of HB 2779 and permanently revoked for a second violation of HB 2779.

71. HB 2779 requires that after December 31, 2007, every employer must verify the employment eligibility of employees through the federal government's otherwise voluntary Basic Pilot Program.

72. Plaintiffs are entitled to injunctive relief. They have a strong likelihood of success on the merits and will suffer irreparable harm if HB 2779 is not enjoined and is enforced against employers in Arizona, including Plaintiffs.

73. Plaintiffs will suffer irreparable harm as a result of the potential enforcement of HB 2779, as a result of the legal uncertainty that they face due to HB 2779's vagueness and its provisions that conflict with other laws and the Constitution.

74. Plaintiffs are entitled to recover the costs and attorneys' fees of bringing this suit pursuant to 42 U.S.C. § 1988.

FIRST CLAIM FOR RELIEF

VIOLATION OF PROCEDURAL DUE PROCESS GUARANTEES UNDER THE U.S. CONSTITUTION

75. Plaintiffs hereby incorporate by this reference all allegations of the preceding paragraphs of this Complaint, as if fully set forth herein.

76. Under the 14th Amendment to the U.S. Constitution, state and local governments are prohibited from depriving any person of property without due process of law.

77. Corporations, including Plaintiffs and their members, are persons entitled to due process.

78. Licenses or permits from the State of Arizona and/or its political subdivisions are property interests that are subject to the due process protections of the 14th Amendment to the U.S. Constitution.

79. The Governor, the Attorney General, the State of Arizona and its political subdivisions and other public officials are prohibited by the 14th Amendment from suspending or revoking business licenses or permits unless the State or its political subdivisions provide due process of law to the holder of the license or permit.

80. Due process of law requires, at a minimum, that before any person, whether an individual, corporation or other business entity, may be deprived of a license or permit, the State must provide:

(a) Notice and a reasonable definite statement of the charges or matters at issue.

(b) Notice of the time and place of a hearing.

(c) The right to produce witnesses at a hearing.

(d) The right to examine witnesses at a hearing.

(e) The right to a full consideration and determination of the issues based on the evidence.

81. HB 2779 does not provide Plaintiffs, their members, or other employers with due process before the State may deprive them of property interests.

82. In contrast to HB 2779, federal immigration law contains provisions to provide due process rights to employers. Under federal immigration law, before an employer is found to have violated the law, the employer is provided the following due process rights:

(a) A signed, written complaint must be filed with sufficient information to identify the complainant and the potential violator, including names and addresses.

(b) The federal government investigates only those complaints "which, on their face, have a substantial probability of validity." 8 U.S.C. § 1324a(c)(1)(B).

(c) After investigation the federal government issues a warning Notice of Intent to Fine.

(d) The Notice of Intent to Fine must include the basis for the charges, the statutory provisions alleged to have been violated, and the penalty to be imposed.

(e) The Notice of Intent to Fine must also notify the employer of its rights, including the right to counsel, that any statement may be used against the employer, and the employer's right to a hearing.

(f) The respondent employer has a right to request a hearing before a federal administrative law judge. 8 CFR § 274a.9(e) and 8 U.S.C. § 1324a(e)(3).

(g) The employer has the right to an evidentiary hearing, with appellate review, as is customary in other federal administrative/ adjudicative proceedings.

(h) At the hearing, the employer has the right to present evidence and to cross-examine witnesses regarding the evidence presented against it.

83. Under HB 2779, Plaintiffs, their members, and other employers will not be provided any of the due process rights of federal law set forth in the preceding paragraph.

84. Under HB 2779, Plaintiffs, their members and other employers will be subject to an enforcement scheme that includes the following:

(a) Complaints may be initiated by any person without a signed written complaint, without any standards, without any requirements for the identification of the person(s) who is accused of not being authorized to work in this country, without any disclosure or identification of the basis for the allegation that an employee is not authorized to work, and without any requirement that any basis for the allegation must exist before an investigation must be initiated.

(b) Complaints may be initiated based solely on or primarily on race, national origin, language ability or characteristics, accent, physical appearance, clothing characteristic of an ethnic group, religious attire, racial or ethnic prejudice or other unlawful factors.

(c) Complaints may be initiated for reasons unrelated to the enforcement of immigration laws.

(d) The Attorney General and County Attorneys are compelled to investigate all complaints

regardless of the lack of any basis for the complaint.

(e) The Attorney General and County Attorneys must investigate all complaints, even if the basis for the complaint is racial or ethnic prejudice or discrimination or any other improper unlawful motive.

(f) There is no notice of the initiation of an investigation to the employer or to the individual who is the subject of the investigation (the "Affected Employee").

(g) The investigation relating to whether an employee is authorized to work in the United States consists solely of a request by the Attorney General or a County Attorney to the federal government to check federal computer records pursuant to 8 U.S.C. § 1373(c).

(h) HB 2779 excludes the ability of the Attorney General or County Attorneys to consider any other evidence besides the response from the federal government pursuant to 8 U.S.C. § 1373(c) in determining whether an employee is authorized to work.

(i) The County Attorneys are compelled to prosecute the employer in every case in which a complaint was investigated and found "not frivolous."

(j) In any proceedings in Arizona courts to impose penalties under HB 2779, including the suspension or revocation of all business licenses or permits of Plaintiffs, their members, and other employers, HB 2779 restricts the evidence that may be considered.

(k) HB 2779 provides in part, "On determining whether an employee is an unauthorized alien, the Court shall consider only the federal government's determination pursuant to 8 U.S.C. § 1373(c)." [A.R.S. § 23-212(H).] HB 2779 also states that Arizona courts may take judicial notice of the federal government's so-called "determination" under 8 U.S.C. § 1373(c).

(l) HB 2779 does not give employers the right to call witnesses on their behalf to establish the work authorization of Affected Employees.

(m) HB 2779 does not give Affected Employees the right to call witnesses on their behalf to establish their work authorization.

(n) HB 2779 does not give employers or Affected Employees the right to cross-examine witnesses for the federal or state government on the issue of the Affected Employee's work authorization.

(o) HB 2779 does not provide a procedure whereby an employer or Affected Employee may challenge erroneous "determinations" of immigration status.

(p) Due process rights are not provided to the employer or the Affected Employee under HB 2779.

(q) There is no "determination" made under 8 U.S.C. § 1373(c). The federal government's informational response under 8 U.S.C. § 1373(c) is not a determination, but is merely a reflection of whatever information is in the federal government's database.

(r) Due process rights are not provided before the federal government furnishes a response under 8 U.S.C. § 1373(c).

(s) The absence of any "determination" pursuant to 8 U.S.C. § 1373(c) is reflected by the fact that federal immigration law does not provide for any action to be taken by the federal government against a person or employer based upon response under 8 U.S.C. § 1373(c). Determinations by the federal government of whether an employer knowingly employed an unauthorized alien are made pursuant to 8 CFR § 274a.9, and require a hearing and due process, as set forth in paragraph 82 above. Determinations of an alien's status are made pursuant to administrative procedures that provide due process protections. Determinations are not made pursuant to 8 U.S.C. § 1373(c), and the federal immigration system does not provide a final determination of immigration status at the request of a state or local government.

(t) To find that an Arizona employer knowingly or intentionally employed an unauthorized alien, the Arizona Court will be required to make a determination that the Affected Employee is an unauthorized alien, but the Arizona Court has no authority to determine an alien's immigration status. Such status determinations may be made only by a federal immigration judge. 8 U.S.C. § 1229a (a)(1) and (a)(3). HB 2779 does not provide due process to Employers and Affected Employees to subject them to a hearing in an

Arizona Court that does not have jurisdiction to determine immigration status.

85. The procedures established under HB 2779 do not satisfy the due process requirements of the United States Constitution.

86. It is a violation of Plaintiffs' due process rights for the State of Arizona to make mandatory the use of the federal government's otherwise voluntary electronic employment verification system known as the Basic Pilot Program because HB 2779 conflicts with federal law and information given to employers by the federal government regarding the voluntary nature of their participation in the Basic Pilot Program, as alleged more fully in paragraphs 169-174 below.

87. It is a violation of Plaintiffs' due process rights for HB 2779 to make mandatory the use of the federal government's Basic Pilot Program because the laws of the State of Illinois prohibit the use the Basic Pilot Program unless and until it meets performance standards that it currently does not meet, as alleged more fully in paragraphs 182-186 below.

88. HB 2779 violates the due process rights of members of Plaintiffs who have employees in both Arizona and Illinois because HB 2779 places employers in the position of violating the laws of either Arizona or Illinois and makes it impossible for such employers to comply with the laws of both states.

89. Plaintiffs are entitled to a declaratory judgment that HB 2779 is unconstitutional because it violates the 14th Amendment to the U.S. Constitution.

90. Plaintiffs are entitled to a preliminary and permanent injunction to enjoin the Governor and

Attorney General from taking actions to enforce or implement HB 2779.

SECOND CLAIM FOR RELIEF

VIOLATION OF PROCEDURAL DUE PROCESS GUARANTEES OF ARIZONA CONSTITUTION

91. Plaintiffs hereby incorporate by this reference all allegations of the preceding paragraphs of this Complaint, as if fully set forth herein.

92. Article II, § 4 of the Arizona Constitution prohibits state and local governments from depriving any person of property without due process of law.

93. Corporations, including Plaintiffs and their members, are persons entitled to due process.

94. Licenses or permits from the State of Arizona and/or its political subdivisions are property interests that are subject to the due process protections of Article II, § 4 of the Arizona Constitution.

95. The Governor, the Attorney General, the State of Arizona and its political subdivisions and other public officials are prohibited by Article II, § 4 of the Arizona Constitution from suspending or revoking business licenses or permits unless the State or its political subdivisions provide the holder of the license or permit due process of law.

96. The State's actions that violate the 14th Amendment to the U.S. Constitution, as alleged in paragraphs 75-90 above, also violate the Arizona Constitution.

97. The procedures established by HB 2779 do not satisfy and are in conflict with provisions of existing Arizona law for the procedures that must be used and due process rights that must be provided in order for

the State to suspend or revoke licenses or permits of the State.

98. The procedures established under HB 2779 do not satisfy the due process requirements of the Arizona Constitution.

99. Plaintiffs are entitled to a declaratory judgment that HB 2779 is unconstitutional because it violates Article II § 4 of the Arizona Constitution.

100. Plaintiffs are entitled to a preliminary and permanent injunction to enjoin the Governor and Attorney General from taking actions to enforce or implement HB 2779.

THIRD CLAIM FOR RELIEF

VIOLATION OF SUBSTANTIVE DUE PROCESS UNDER THE U.S. CONSTITUTION

101. Plaintiffs hereby incorporate by this reference all allegations of the preceding paragraphs of this Complaint, as if fully set forth herein.

102. Under the 14th Amendment to the U.S. Constitution, state and local governments are prohibited from arbitrarily and capriciously depriving a person of a fundamental right guaranteed by the U.S. Constitution.

103. Corporations, including Plaintiffs and their members, are persons entitled to fundamental rights under the 14th Amendment.

104. Plaintiffs and their members have a fundamental right to associate with whomever Plaintiffs choose.

105. HB 2779 is so broad and vague that it infringes on Plaintiffs' fundamental right to associate with whomever Plaintiffs choose to associate.

106. Plaintiffs have a fundamental right to not have the State of Arizona interfere with interstate commerce.

107. HB 2779 infringes on Plaintiffs' fundamental right to not have the State interfere with interstate commerce, as HB 2779 regulates and interferes with interstate commerce.

108. Plaintiffs are entitled to a declaratory judgment that HB 2779 is unconstitutional because it violates the substantive due process guarantees of the 14th Amendment to the U.S. Constitution.

109. Plaintiffs are entitled to a preliminary and permanent injunction to enjoin the Governor and Attorney General from taking actions to enforce or implement HB 2779.

FOURTH CLAIM FOR RELIEF

VIOLATION OF SUBSTANTIVE DUE PROCESS GUARANTEES OF THE ARIZONA CONSTITUTION

110. Plaintiffs hereby incorporate by this reference all allegations of the preceding paragraphs of this Complaint, as if fully set forth herein.

111. Under the Arizona Constitution, state and local governments are prohibited from arbitrarily and capriciously depriving a person of a fundamental right guaranteed by the Arizona Constitution.

112. Corporations, including Plaintiffs and their members, are persons entitled to fundamental rights under the Arizona Constitution.

113. Plaintiffs and their members have a fundamental right to associate with whomever Plaintiffs choose.

114. HB 2779 is so broad and vague that it infringes on Plaintiffs' fundamental right to associate with whomever Plaintiffs choose to associate.

115. Plaintiffs have a fundamental right to not have the State of Arizona interfere with interstate commerce.

116. HB 2779 infringes on Plaintiffs' fundamental right to not have the state interfere with interstate commerce, as HB 2779 regulates interstate commerce.

117. Plaintiffs are entitled to a declaratory judgment that HB 2779 is unconstitutional because it violates the substantive due process guarantees of Article II, § 4 of the Arizona Constitution.

118. Plaintiffs are entitled to a preliminary and permanent injunction to enjoin the Governor and Attorney General from taking actions to enforce or implement HB 2779.

FIFTH CLAIM FOR RELIEF

VIOLATION OF COMMERCE CLAUSE

119. Plaintiffs hereby incorporate by this reference all allegations of the preceding paragraphs of this Complaint, as if fully set forth herein.

120. The Commerce Clause of the U.S. Constitution vests Congress with the exclusive authority to "regulate Commerce . . . among the several states." U.S. Constitution, Art. I, § 8, cl. 3. The Commerce Clause forbids states and local governments, including the State of Arizona, from regulating or passing laws that restrict or interfere with interstate commerce.

121. HB 2779 purports to and will regulate interstate commerce.

122. Although the definition of employer contained in HB 2779 provides that the employer must have a license or permit from the State of Arizona, or one of its political subdivisions, and must have at least one employee in Arizona, HB 2779 does not contain a definition of employee that is limited to employees who were hired or who perform services within Arizona.

123. The definition of employee in HB 2779 includes "any person who performs employment services for an employer pursuant to an employment relationship between the employee and employer." A.R.S. § 23-211(3).

124. By its terms, the above definition of employee contained in HB 2779 includes all employees who work for any business that has one or more employees within the State of Arizona and a license or permit from the State of Arizona or one of its political subdivisions.

125. The definition of employee subject to regulation by HB 2779 includes employees who work exclusively in states other than Arizona, who were hired in states other than Arizona and who have never worked in Arizona, but work for businesses that have at least one employee in Arizona and hold a license or permit from the State of Arizona or one of its political subdivisions.

126. The above definition of employee subject to regulation by HB 2779 includes employees who were hired in states other than Arizona and who later were transferred or relocated to Arizona to perform employment services in Arizona.

127. The above definition of employee subject to regulation by HB 2779 includes employees who were

hired in states other than Arizona and who perform work in Arizona on only an occasional basis.

128. Under HB 2779, the Attorney General or County Attorneys will be required to investigate complaints relating to employees who were hired in states other than the State of Arizona.

129. Under HB 2779, the Attorney General or County Attorneys will be required to investigate complaints relating to employees who were hired in states other than Arizona and who are residents of states other than Arizona and who perform services in Arizona on only an occasional or temporary basis or not at all.

130. Under HB 2779, the Attorney General or County Attorneys will be required to investigate complaints relating to employees who were hired in states other than Arizona and who perform services only in states other than Arizona, as there is nothing in HB 2779 that restricts the regulation and enforcement of its provisions to employees who are performing services within the State of Arizona.

131. Under HB 2779, the enforcement actions of the State of Arizona will extend to employees or job sites in states other than Arizona, as there is nothing in HB 2779 that restricts the regulation and enforcement of its provisions to employees performing services in the State of Arizona or work sites in the State of Arizona.

132. Under HB 2779, Arizona businesses could lose their Arizona licenses for conduct that occurred wholly outside the State of Arizona and that the State of Arizona has no authority to regulate.

133. HB 2779 requires employers to use the Basic Pilot Program to verify the employment eligibility of its employees after December 31, 2007.

134. The requirement that employers use the Basic Pilot Program to verify the employment eligibility of its employees is not limited to employees in the State of Arizona, but applies to all employees of businesses that have at least one employee in Arizona and a license or permit issued by the State or one of its political subdivisions.

135. By requiring that employers use the Basic Pilot Program to verify the work authorization of employees who do not perform services in Arizona and by extending investigations and enforcement actions to employees outside of Arizona. Arizona is regulating commerce that occurs wholly outside the State of Arizona and that the State of Arizona has no authority to regulate.

136. Plaintiffs are entitled to a declaratory judgment that HB 2779 is unconstitutional because it violates the Commerce Clause of the U.S. Constitution due to its extraterritorial effects and control of commerce that occurs outside the borders of Arizona.

137. Plaintiffs are entitled to a preliminary and permanent injunction to enjoin the Governor and Attorney General from taking actions to enforce or implement HB 2779.

SIXTH CLAIM FOR RELIEF

VIOLATIONS OF SUPREMACY CLAUSE OF U.S. CONSTITUTION AND PRE-EMPTION BY FEDERAL IMMIGRATION LAW

138. Plaintiffs hereby incorporate by this reference all allegations of the preceding paragraphs of this Complaint, as if fully set forth herein.

139. Under the Supremacy Clause of the U.S. Constitution, federal law may expressly or implicitly pre-empt state and local laws.

140. In accordance with its exclusive power over matters of immigration, the U.S. Congress has adopted, pursuant to the Immigration and Nationality Act, 8 U.S.C. § 1101 et seq., and other laws, a comprehensive system of laws, regulations, and procedures and has created administrative agencies that determine, subject to judicial review, whether and under what conditions individuals may enter, stay in, and work in the U.S. and a system of civil and criminal penalties for those violating the law, including employers who knowingly employ unauthorized aliens.

141. When enacting the Immigration Reform and Control Act, Congress expressly pre-empted state and local laws. The Immigration Reform and Control Act provides, in part, as follows: "[Federal law] pre-empts any state or local law imposing similar criminal sanctions (other than through licensing and similar laws) upon those who employ unauthorized aliens." 8 U.S.C. § 1324a(h)(2).

142. The licensing exception was designed and intended to allow state governments to take action against the business license for employers "found to have violated the sanctions provision" of 8 U.S.C. § 1324a—essentially only after the employer had been found by the federal government to have violated the federal law.

143. The licensing exception to the preemption clause in 8 U.S.C. § 1324a(h)(2) does not allow states to pass laws prohibiting the employment of unauthorized aliens.

144. The federal government has enacted broad, comprehensive immigration laws that govern who is eligible to work in the United States and that govern the process by which employers must verify the eligibility of job applicants.

145. The federal government has occupied the field of immigration regulation through the Immigration and Nationality Act, the Immigration Reform and Control Act of 1986 ("IRCA"), the Illegal Immigration Reform and Immigrant Responsibility Act, and other laws, including occupying the field relating to prohibiting the employment of unauthorized workers and verifying the eligibility of job applicants.

146. The immigration laws, procedures, and policies created by the federal government regulate immigration and confer rights in a careful balance reflecting the national interest.

147. Congress carefully balanced the requirements and penalties in the federal immigration law with consideration of the tension that immigration compliance and sanctions might cause relating to race, national origin, and citizenship discrimination.

148. The Constitution bars the State from altering or obstructing the federal government's carefully crafted comprehensive immigration regime.

149. Federal law governs the documents that employers must accept to make employment decisions regarding whether persons are authorized to work in this country.

150. Federal law prohibits employers from conducting any further investigation or taking any steps other than reviewing any of the 29 forms of documents that employees have the right, under

federal law, to present to an employer to establish eligibility for employment in this country. Once an employee has satisfied the verification requirements of 8 U.S.C. § 1324a, employers are barred by federal law from seeking additional information regarding their authorization to work.

151. Federal law prohibits employers from making additional inquiries, conducting additional investigations, or taking additional steps to determine an applicant's or employee's eligibility to work in this country, other than (i) having examined the original documents that the employee chose to present, (ii) if the employer voluntarily enters into an agreement, to utilize the Basic Pilot Program, and (iii) taking certain steps in response to receiving a communication from the Social Security Administration that an employee's name does not match an employee's Social Security number.

152. The federal government has failed to issue tamper-proof and forgery-proof forms of identification to persons that employers may rely upon to confirm with accuracy and reliability the identity of a person or the person's eligibility to work in the United States.

153. The State of Arizona has failed to issue tamper-proof and forgery-proof documents establishing the identity of residents of the State of Arizona.

154. Federal immigration law and federal employment discrimination laws prohibit employers from taking action to refuse to hire or discharge employees based upon their citizenship, national origin, race, color or other classifications protected by law.

155. HB 2779 threatens the uniformity and primacy of the federal immigration system and conflicts with federal immigration law.

156. HB 2779 stands as an obstacle to the uniform enforcement and application of federal immigration laws and the comprehensive regime created by Congress.

157. HB 2779 imposes penalties on employers for Arizona's state-regulated immigration enforcement measures beyond and different than what the federal government requires.

158. HB 2779 makes unlawful an additional immigration-related employment practice that is not prohibited under federal law, that of "intentionally" employing an unauthorized alien.

159. The prohibition in HB 2779 against "intentionally" employing an unauthorized alien is preempted by IRCA. It is inconsistent with the uniform enforcement of federal immigration law and Congress has already acted, through IRCA, to occupy the field regarding controlling the employment of aliens.

160. The definition of "license" in HB 2779 subject to being suspended or revoked includes items that are not licenses within any traditional sense of the word or as the term is used in 8 U.S.C. § 1324a(h)(2).

161. Articles of Incorporation, a grant of authority, a Certificate of Partnership, a Partnership Registration and Articles of Organization are not "licenses."

162. The Arizona Legislature exceeded the savings clause in 8 U.S.C. § 1324a(h)(2) when it defined "license" to include Articles of Incorporation, a grant of authority, a Certificate of Partnership, a Partnership Registration, and Articles of Organization.

163. Under HB 2779, Arizona courts could order the Arizona Corporation Commission to "suspend" corporations' Articles of Incorporation.

164. There is no legal meaning to "suspending" a corporation's Article of Incorporation. Either the corporation's charter exists or it does not. There is no in-between concept of a "suspended" Articles of Incorporation.

165. The federal government does not require employers to use the Employment Eligibility Verification System (Basic Pilot Program). It is a strictly voluntary program, except in the few cases where the federal government requires employers that violated the employment verification laws to use the Basic Pilot Program as part of a settlement with the federal government.

166. The fact that the federal government does not require employers to use the Basic Pilot Program evidences the intent of the federal government that the Basic Pilot Program remain voluntary and that employers are not to be required to use the Basic Pilot Program.

167. In order to use the Basic Pilot Program, employers must enter into a contract with the federal government that is contained in a Memorandum of Understanding issued by the federal government.

168. The terms of the contract with the federal government for use of the Basic Pilot Program obligate employers to use the Basic Pilot Program in accordance with the federal government's requirements and procedures, including but not limited to the matters set forth in the federal government's Memorandum of Understanding and a 95-page User's Manual for the Basic Pilot Program.

169. In order to enroll in the federal government's Basic Pilot Program, Arizona employers must access

the Basic Pilot Program through a computer and the use of the Internet.

170. The federal government provides information to potential and actual users of the Basic Pilot Program, via a computer internet connection, to inform potential and actual users of the Basic Pilot Program about the terms and conditions for operation and use of the Basic Pilot Program.

171. The information provided by the federal government to potential and actual users of the Basic Pilot Program specifically informs them that the use of the Basic Pilot Program by employers is voluntary.

172. HB 2779 is preempted by federal law and is unconstitutional under the Supremacy Clause, and is a denial of due process because of the conflicting and inconsistent provisions of the state and federal law and the conflicting and inconsistent information that employers receive from the State of Arizona and the federal government. The State of Arizona, by enacting HB 2779, mandates that Arizona employers must log onto a federal website that provides Arizona employers with information from the federal government that is the opposite of and contradictory to the provisions of HB 2779.

173. HB 2779 places Arizona employers, including plaintiffs and their members, at risk of being found to be in violation of Arizona law because Arizona employers followed and complied with the information from the federal government that their use of the Basic Pilot Program is voluntary, as communicated to them by the federal government on the computer system maintained by the federal government and that is made mandatory by HB 2779.

174. It is preempted by the federal law, unconstitutional, and a denial of due process for the State of Arizona to place Arizona employers in the position of disregarding, ignoring, or not following the information and directions given to them by the federal government on the very computer system that the State of Arizona requires Arizona employers to use in order to participate in the Basic Pilot Program.

175. The federal government's Memorandum of Understanding provides that the federal government may revoke the right of any employer to use the Basic Pilot Program if they do not comply with all of the federal government's requirements for use of the program.

176. Studies by the federal government document that at least half of the current users of the Basic Pilot Program violate the federal government's requirements in the manner in which they use the program.

177. The Memorandum of Understanding that is a contract between employers and the federal government for use of the Basic Pilot Program obligates the federal government to furnish to the employer the name, address and telephone number of a federal government employee who will available [sic] to answer the employer's questions and provide support for the employer's use of the Basic Pilot Program.

178. The State of Arizona does not have the authority to require employers to use the Basic Pilot Program, and its attempt to do so in HB 2779 is preempted by federal law.

179. HB 2779 will place burdens on the Executive Branch of the federal government including the Department of Justice, Department of Homeland

Security, and Social Security Administration, that will impede the functions of those agencies.

180. By requiring that every complaint be investigated and that every investigation must involve querying the federal government under 8 U.S.C. § 1373(c), HB 2779 places an impermissible burden on the federal government.

181. By requiring that every Arizona employer use the Basic Pilot Program, HB 2779 places an impermissible burden on the Executive Branch of the federal government, including the Social Security Administration and the Department of Homeland Security, who currently do not have the resources to successfully absorb, support, monitor and enforce the compliance of 139,500 new Arizona users of the Basic Pilot Program, which currently has approximately 17,000 companies enrolled and only half that many that actively use the program.

182. HB 2779 is preempted by the Constitution and federal law because it places some Arizona employers, including some of the Plaintiffs and some of their members in the position of being compelled to violate the laws of the State of Illinois.

183. The State of Illinois has enacted Public Act 095-0138, that states, in part, "employers are prohibited from enrolling in any employment eligibility verification system, including the Basic Pilot Program, as authorized by 8 U.S.C. § 1324(a) . . . until the Social Security Administration (SSA) and Department of Homeland Security (DHS) databases are able to make a determination on 99% of the tentative non-confirmation notices issued to employers within three days, unless otherwise required by federal law."

184. The Social Security Administration and Department of Homeland Security databases do not meet the performance standards mandated by the State of Illinois, as set forth above.

185. Arizona employers who also have employees in Illinois are therefore prohibited by the State of Illinois from using the Basic Pilot Program, but are compelled by the State of Arizona to use the Basic Pilot Program under HB 2779 effective on January 1, 2008.

186. HB 2779 violates the Supremacy Clause of the Constitution, is preempted by federal law, and violates due process rights. It places some Arizona employers, including some of the Plaintiffs and their members, in the position of mandating under Arizona law that they violate the laws of the State of Illinois.

187. The federal government's Basic Pilot Program is intended to be and has been adopted and implemented by the federal government as a program for which enrollment by participating employers is voluntary.

188. In order to enroll and participate in the Basic Pilot Program, employers must agree to a Memorandum of Understanding that imposes obligations upon employers.

189. The obligations imposed upon employers pursuant to the terms of the Basic Pilot Program Memorandum of Understanding include the employer's consent to certain rights of the federal government to inspect the employer's property and documents.

190. As set forth in the Eighth Claim for Relief, under the Fourth Amendment to the U.S. Constitution, the federal government would not possess the

right to conduct searches without a warrant of the property and documents of employers who participate in the Basic Pilot Program without the consent of employers to allow such searches without a warrant.

191. The Basic Pilot Program's requirement that participating employers consent to the right of the federal government to conduct searches of the property and documents of employers who participate in the Basic Pilot Program requires that the participation of employers in the Basic Pilot Program must be voluntary on the part of the employers.

192. If employers are compelled to participate in the Basic Pilot Program, they will not have consented to the rights of the federal government to conduct searches of the employers' property and documents.

193. HB 2779 compels Arizona employers, including Plaintiffs and their members, to participate in the otherwise voluntary Basic Pilot Program.

194. By compelling participation in the Basic Pilot Program, HB 2779 is inconsistent with and negates the voluntariness of the Basic Pilot Program that is essential for there to be consent to the federal government's right to inspect the participating employers' property and documents without a warrant.

195. HB 2779 is preempted by federal law and violates the Supremacy Clause of the U.S. Constitution by interfering with, contradicting, and negating the voluntariness of the participating in the Basic Pilot Program that is essential for the participants in the program having given consent to the federal government's rights under the Memorandum of Understanding to conduct searches of the employers' property and documents without a warrant.

196. Plaintiffs are entitled to a declaratory judgment that HB 2779 is unconstitutional because it is preempted by federal law.

197. Plaintiffs are entitled to a preliminary and permanent injunction to enjoin the Governor and Attorney General from taking actions to enforce or implement HB 2779.

SEVENTH CLAIM FOR RELIEF

VIOLATION OF THE SEPARATION OF POWERS DOCTRINE OF THE ARIZONA CONSTITUTION.

198. Plaintiffs hereby incorporate by this reference all allegations of the preceding paragraphs of this Complaint, as if fully set forth herein.

199. The Constitution of Arizona divides the State Government of Arizona into three branches, the executive, legislative and judicial. Article III of the Constitution states as follows:

> The powers of the government of the State of Arizona shall be divided into three separate departments, the Legislative, the Executive, and the Judicial, and, except as provided in this Constitution, such departments shall be separate and distinct, and no one of such departments shall exercise the powers properly belonging to either of the others.

200. The Arizona Constitution prohibits each branch of government from exercising the powers that are given by the Constitution to a separate branch of government.

201. The Constitution of Arizona prohibits the Legislative Branch of government from exercising executive powers that properly belong to the Executive Branch of government.

202. The Legislative Branch has the power to write and pass laws. The Executive Branch has the sole power to carry out the provisions of the law.

203. HB 2779 contains a legislative mandate that the Executive Branch of government investigate every complaint that it receives alleging that an employer is knowingly or intentionally employing an unauthorized alien.

204. HB 2779 dictates the method by which the Executive Branch of government shall investigate each complaint. HB 2779 mandates that the investigation regarding an employee's status shall consist solely of an inquiry to the federal government pursuant to 8 U.S.C. § 1373(c).

205. HB 2779 prohibits the Executive Branch of government from considering information other than a response from the federal government pursuant to 8 U.S.C. § 1373(c) in acting upon each complaint received by the Executive Branch and determining whether an alien is authorized to work in the United States.

206. HB 2779 mandates that the Executive Branch of government prosecute each complaint that is "not frivolous."

207. HB 2779 does not allow the exercise of discretion by the Executive Branch in enforcing HB 2779. Prosecutors will be required to bring lawsuits that on balance lack merit but do not fall to the level of being "frivolous."

208. HB 2779 mandates that the Executive Branch take each of the above actions regardless of the resources, other duties, professional judgment and other priorities or factors that the Executive Branch would otherwise consider in discharging its duties

under HB 2779 and under all other laws for which it has the responsibility to take action.

209. Because of the mandate of HB 2779 that all complaints under HB 2779 must be investigated and all non-frivolous complaints under HB 2779 must be prosecuted, it is possible that the Executive Branch of the Arizona Government may be unable to discharge other important duties that are the responsibility of the Executive Branch, including but not limited to prosecuting suspects for murder, rape, child molestation, hate crimes, financial fraud, driving while intoxicated, and other crimes.

210. The above provisions of HB 2779 violate the separation of powers clause of the Arizona Constitution. Each of the provisions set forth above constitutes the exercise by the Legislative Branch of powers that are reserved to the Executive Branch.

211. Plaintiffs are entitled to a declaratory judgment that HB 2779 is unconstitutional because it violates the separation of powers of the Arizona Constitution.

212. Plaintiffs are entitled to a preliminary and permanent injunction to enjoin the Governor and Attorney General from taking actions to enforce or implement HB 2779.

EIGHTH CLAIM FOR RELIEF

VIOLATION OF PROTECTION AGAINST UNREASONABLE SEARCHES AND SEIZURES UNDER THE U.S. CONSTITUTION

213. Plaintiffs hereby incorporate by reference all allegations of the preceding paragraphs of this Complaint, as fully set forth herein.

214. Pursuant to the Fourth and Fourteenth Amendments of the U.S Constitution, state and local

governments are prohibited from conducting unreasonable searches and seizures. The Fourth Amendment provides:

> The right of people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be search [sic], and the person or things to be seized.

215. HB 2779 mandates that after December 31, 2007, every employer must verify the employment eligibility of employees through the federal government's otherwise voluntary Basic Pilot Program.

216. Every employer that participates in the Basic Pilot Program must sign a Memorandum of Understanding that states responsibilities and obligations of the employer. Article II, Section C(14) of the Memorandum of Understanding requires employers to allow the Department of Homeland Security, or authorized agents to make periodic visits to the employers, to review Basic Pilot-related records, to interview employees of the employer, and to inspect other employment records.

217. An employer's enrollment in the Basic Pilot Program subjects the employer to greater rights by the federal government to inspect records and obtain access to an employer's property than would otherwise exist without a warrant.

218. HB 2779, by compelling Plaintiffs and their members to enroll and participate in the Basic Pilot Program, constitutes a forced waiver of Fourth Amendment rights to be free from unreasonable searches and seizures. Mandating participation in

the Basic Pilot Program and mandating signing the Memorandum of Understanding is not a proper consent to search or waiver of employers' Fourth Amendment protections. Rather, it effectively forces employers to waive their constitutionally guaranteed protections against warrantless searches.

219. Plaintiffs are entitled to a declaratory judgment that HB 2779 is unconstitutional because it violates the Fourth Amendment of the U.S. Constitution.

220. Plaintiffs are entitled to a preliminary and permanent injunction to enjoin the Governor and Attorney General from taking actions to enforce or implement HB 2779.

DEMAND FOR RELIEF

WHEREFORE, Plaintiffs respectfully demand judgment awarding the following:

A. A declaratory judgment pursuant to 28 U.S.C. §§ 2201 and 2202 declaring that HB 2779 is unconstitutional because it violates the procedural due process guarantees of the 14th Amendment to the U.S. Constitution.

B. A declaratory judgment pursuant to 28 U.S.C. §§ 2201 and 2202 declaring that HB 2779 is unconstitutional because it violates the procedural due process guarantee of Article II § 4 of the Arizona Constitution.

C. A declaratory judgment pursuant to 28 U.S.C. §§ 2201 and 2202 declaring the [sic] HB 2779 is unconstitutional because it violates the substantive due process guarantees of the 14th Amendment to the U.S. Constitution.

D. A declaratory judgment pursuant to 28 U.S.C. §§ 2201 and 2202 declaring that HB 2779 is unconstitutional because it violates the substantive due process guarantees of Article II § 4 of the Arizona Constitution.

E. A declaratory judgment pursuant to 28 U.S.C. §§ 2201 and 2202 declaring that HB 2779 is unconstitutional because it is pre-empted by federal law.

F. A declaratory judgment pursuant to 28 U.S.C. §§ 2201 and 2202 declaring that HB 2779 is unconstitutional because it violates the commerce clause of the U.S. Constitution.

G. A declaratory judgment pursuant to 28 U.S.C. §§ 2201 and 2202 declaring that HB 2779 is unconstitutional because it violates the separation of powers of the Arizona Constitution.

H. A declaratory judgment pursuant to 28 U.S.C. §§ 2201 and 2202 declaring that HB 2779 is unconstitutional because it violates the Fourth Amendment to the U.S. Constitution.

I. A preliminary and permanent injunction to enjoin the Governor and Attorney General from taking actions to enforce or implement HB 2779.

J. An award of attorneys' fees and costs, plus interest, pursuant to 42 U.S.C. § 1988.

K. Such other relief as the Court deems just and proper.

RESPECTFULLY SUBMITTED this 29th day of August, 2007.

BALLARD SPAHR ANDREWS & INGERSOLL, LLP

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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA
PHOENIX DIVISION

Case No. ___

CHICANOS POR LA CAUSA, INC.; and
SOMOS AMERICA,
Plaintiffs,

vs.

JANET NAPOLITANO, in her official capacity as Governor of the State of Arizona; TERRY GODDARD, in his official capacity as Attorney General of the State of Arizona; and GALE GARRIOTT, in his official capacity as the Director of the Arizona Department of Revenue,
Defendants.

COMPLAINT

INTRODUCTION

1. This lawsuit challenges Arizona's attempt to enact laws regulating immigration that intrude on the federal government's plenary power and provide less protection to workers and employers than federal laws.

2. The recently- enacted Legal Arizona Workers Act (the "Act"), establishes a system unique to Arizona for sanctioning employers that employ aliens who are not authorized to work. The Act also requires employers to verify the employment eligibility of each employee

through a federal verification program, even though federal law establishes that participation in that program is voluntary. The Act is attached as Exhibit A.

3. The Act violates the Supremacy Clause of the United States Constitution because it is preempted by federal immigration law and the federal government's exclusive authority to regulate immigration. The Act also violates the Fourteenth Amendment to the U.S. Constitution because it deprives employers and workers of liberty and property without due process of law.

4. Were the Act's provisions regarding employment of unauthorized aliens and verification of employment eligibility to be upheld, it would be license for every state and, indeed, every locality to enact its own immigration laws. The result would be inconsistency and extreme confusion. This lawsuit seeks to avoid that result.

5. This lawsuit also seeks to prevent the inevitable harm to workers who are authorized to work in the United States, particularly foreign-born workers and national origin minorities, that the Act will cause if it is allowed to take effect. The Act will cause authorized workers to not be hired, to be terminated, to have to undertake additional state-created efforts to demonstrate that they are authorized to work, or to suffer other harms. Finally, the suit seeks to prevent harm to employers who must comply with the Act.

JURISDICTION AND VENUE

6. This Court has jurisdiction under 28 U.S.C. §§1331 and 1343 because Plaintiffs assert claims under the Constitution of the United States and 42 U.S.C. §1983.

7. Venue is proper in this judicial district under 28 U.S.C. § 1391(b).

PARTIES

8. Plaintiff Chicanos Por La Causa, Inc. ("CPLC") was formed in 1969 by concerned Hispanic citizens to address social issues in their community. Today, CPLC is one of Arizona's largest non-profit, community-based organizations, as well as one of the largest community development corporations in the nation. CPLC is licensed by the State of Arizona and is headquartered in Phoenix. CPLC is committed to building stronger, healthier communities as a lead advocate, coalition builder, and direct service provider. CPLC employs more than 600 people in Arizona and regularly contracts with independent contractors. CPLC has programs in education, including the Migrant Head Start Program, charter schools, prevention programs, and school enrichment programs. CPLC also has programs in housing, including property management; client counseling; and single, multi-family, senior, and self-help housing. CPLC's economic development programs include business lending, commercial development, and employment and training. CPLC runs social services programs, including behavioral health, emergency assistance, domestic violence, elderly, immigration, HIV, health, and legal information and referral services. CPLC subsidiaries include a facility management company, federal credit union, mortgage company, women's care center, construction company, day labor center, and property/real estate purchasing and management company. CPLC challenges the Act because of the harm it will cause to workers that are authorized to work in the United States and to their families. CPLC is concerned that workers, particularly foreign-

born workers and national origin minorities, will not be hired in the first place, will lose their jobs, will have to undertake additional efforts to demonstrate that they are authorized to work, or will otherwise be harmed because of the Act. CPLC in turn may need to divert resources from its ongoing programs to assist persons who are denied employment or terminated. Complying with the employer sanctions and verification provisions of the Act will also harm CPLC. Currently, CPLC complies with federal legal requirements, but does not use the voluntary Basic Pilot Program as a means of verifying employment eligibility of its employees. If the Act takes effect, CPLC will use the voluntary Basic Pilot Program to verify employment eligibility both because the Act requires employers to do so (Ariz. Rev. Stat. §23-214) and, separately, because doing so provides a rebuttable presumption against liability for intentionally or knowingly employing an unauthorized alien (Ariz. Rev. Stat. §23-212(I)). Using the Basic Pilot Program would impose added costs and obligations on CPLC, including learning how to use the Program; registering for the Program, which includes signing a Memorandum of Understanding; and submitting to the Program for all new hires information such as name, date of birth, and social security number.

9. Plaintiff Somos America is a community based coalition of grassroots organizations, community and religious leaders, labor unions, and students established in March 2006 to mobilize for social justice and equal rights for immigrant communities in Arizona and for comprehensive immigration reform. Somos America seeks to challenge injustice and the exploitation of workers and to promote civic participation, political awareness, and education within the Latino community.

10. Defendant Janet Napolitano is sued in her official capacity as the Governor of the State of Arizona. Governor Napolitano signed the Legal Arizona Workers Act, House Bill 2779, into law on July 2, 2007. Pursuant to Article 5, Section 4, of the Arizona Constitution, the Governor "shall take care that the laws be faithfully executed."

11. Defendant Terry Goddard is sued in his official capacity as the Attorney General of the State of Arizona. The Attorney General is Arizona's chief legal officer. Ariz. Rev. Stat. §41-192(A).

12. Defendant Gale Garriott is sued in his official capacity as the Director of the Arizona Department of Revenue. Section 3 of the Act requires the Department of Revenue to provide notice of the Act to every employer on or before October 1, 2007.

GENERAL BACKGROUND

13. Section 2 of the Legal Arizona Workers Act institutes sanctions against employers that intentionally or knowingly employ an unauthorized alien and requires employers to use the federal "Basic Pilot Program" to verify employment eligibility of their employees.

Prohibition on Intentionally or Knowingly Employing an Unauthorized Alien

14. Section 23-212 prohibits employers from intentionally or knowingly employing an unauthorized alien. Ariz. Rev. Stat. §23-212(A). An "unauthorized alien" is defined as an alien who does not have the legal right to work in the United States under federal law. Ariz. Rev. Stat. §23-211(8). An "employer" is defined as any individual or organization that transacts business in Arizona, has a license issued by an

Arizona agency, and employs at least one person who performs employment services in Arizona. Ariz. Rev. Stat. §23-211(4). A "license" is broadly defined to include "any agency permit, certificate, approval, registration, charter or similar form of authorization that is required by law" and that is issued by any state or local agency for the purposes of operating a business in Arizona, and includes articles of incorporation and partnership registrations. Ariz. Rev. Stat. §23-211(1), (7).

15. On receipt of a complaint that an employer is violating the prohibition on employing an unauthorized alien, the Arizona Attorney General or county attorney must investigate the complaint by verifying the work authorization of the alleged unauthorized alien with the federal government, according to the federal inquiry procedure set forth in 8 U.S.C. §1373(c). Ariz. Rev. Stat. §23-212(B).

16. 8 U.S.C. §1373(c) provides: "The Immigration and Naturalization Service shall respond to an inquiry by a Federal, State, or local government agency, seeking to verify or ascertain the *citizenship or immigration status* of any individual within the jurisdiction of the agency for any purpose authorized by law, by providing the requested verification or status information." (Emphasis added.)

17. Employment authorization status is distinct from citizenship or immigration status under federal law.

18. If upon completion of the federal inquiry regarding citizenship or immigration status the Arizona Attorney General or county attorney determines that the complaint that an employer is employing an unauthorized alien was not frivolous, then he or she

must notify United States Immigration and Customs Enforcement and the local law enforcement agency of the presence of the allegedly unauthorized alien. Ariz. Rev. Stat. §23-212(C).

19. For all non-frivolous complaints, the Act requires that the county attorney bring an action against an employer who intentionally or knowingly employs an unauthorized alien in the county where the unauthorized alien is employed. Ariz. Rev. Stat. §23-212(D). In determining whether an employee is unauthorized, the Superior Court may *only* consider the federal government's "determination" under 8 U.S. C. §1373(c), even though that "determination" is deemed to create a "*rebuttable* presumption of the employee's lawful status." Ariz. Rev. Stat. §23-212(H) (emphasis added).

20. An employer that has verified its employee's employment authorization through a voluntary federal verification program known as the Basic Pilot Program is entitled to a rebuttable presumption that the employer did not intentionally or knowingly employ an unauthorized alien. Ariz. Rev. Stat. §23-212(H). The Basic Pilot Program—recently renamed the "E-Verify" program—is a voluntary program the federal government has offered employers.

21. The Act authorizes several state-created employer sanctions for an employer found to have intentionally or knowingly employed unauthorized aliens under the Act. First, the employer must terminate the employment of all unauthorized aliens and file a sworn affidavit stating that it has done so and that it will not intentionally or knowingly employ any unauthorized aliens. Ariz. Rev. Stat. §23-212(F)(1)(a), (1)(c), (2)(a), (2)(d). Second, the employer is placed on probation for the first violation—for three years for a knowing violation and five years for an intentional

violation—during which time the employer must file quarterly reports of each new employee it has hired at the location where the unauthorized alien performed work. Ariz. Rev. Stat. §23- 212(F)(1)(b), (2)(b). Third, all of the employer's licenses may be suspended for a knowing violation; must be suspended for an intentional violation; and, upon a second violation of any type during the probation period, must be permanently revoked. Ariz. Rev. Stat. §23-212(F)(1)(d), (2)(c), (3). Finally, all court orders with respect to violations will be posted on the Attorney General's website to publicize employer violations. Ariz. Rev. Stat. §23-212(G).

Mandated Verification of Work Status Through the Basic Pilot Program

22. The Legal Arizona Workers Act also requires employers, after hiring any employee, to "verify the employment eligibility of the employee through the Basic Pilot Program." Ariz. Rev. Stat. §23-214.

23. The Basic Pilot Program, now known as "E-Verify," refers to a *voluntary* and *experimental* program established by Congress in the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 ("IIRIRA"), Pub. L. No. 104-208 (Sept. 30, 1996), along with two other employment verification pilot programs which have since been suspended. The Basic Pilot Program was extended only until November 2008 under the Basic Pilot Program Extension and Expansion Act of 2003, Pub. L. No. 108-156 (Dec. 3, 2003). 8 U. S.C. § 1324a note. The Basic Pilot Program permits employers who choose to participate to verify electronically workers' employment eligibility. (Pursuant to statute, a few employers that have violated federal employment verification laws may be required to use the Program by the federal government.)

24. The Basic Pilot Program started in 1997 in only six states. The Program has been available nationwide since December 2004. Employers who use the Program must engage in various activities, including learning how to use the Program; registering for the Program, which includes signing a Memorandum of Understanding ("MOU") with the Department of Homeland Security ("DHS") and Social Security Administration ("SSA"); installing software; and submitting to the Program for all new hires data such as employee name, date of birth, and social security number.

25. The MOU imposes requirements on employers, including the following: all employer representatives who use the Program must complete a tutorial; the employer must become familiar with and comply with the manual for the Program (which is lengthy); the employer must agree that in verifying employment eligibility of an employee at the time of hire via the federal Form I-9 process, the employer will only accept documents to establish identity that contain a photograph even though other employers are not so limited under federal law pursuant to 8 C.F.R. §274a.2(b)(1)(v)(B); and the employer must agree not to use the Program as a pre-employment screening procedure or to engage in any unlawful employment practice. The MOU also provides that the federal government may terminate access to the Program with 30 days' notice.

26. The Basic Pilot Program compares data submitted by employers via the Internet to information in federal SSA and DHS databases. The system first uses the SSA database to verify an employee's name, date of birth, and social security number. Upon such verification, if the employee claimed U.S. citizenship and such citizenship is confirmed by SSA's database,

the Basic Pilot Program confirms employment eligibility. For non-U.S. citizens, DHS checks whether the employee is authorized to work. If the SSA database is unable to verify the employee information or DHS is unable to verify employment authorization, the Basic Pilot Program issues a tentative nonconfirmation. An employee may contest a tentative nonconfirmation by contacting the federal government to resolve inaccuracies in the records. If an employee does not contest the tentative nonconfirmation within eight federal working days, it becomes final and employers must terminate the employee.

27. The Basic Pilot Program has encountered a number of problems with accuracy and capacity since its inception. As the United States Citizenship and Immigration Services found in its 2004 report mandated by Congress, the problems include "unacceptably high" tentative nonconfirmation rates for foreign-born work-authorized employees and "higher than desirable" rates for U.S.—born employees; lack of employer compliance with the Program requirements, which reduces the Program's effectiveness and contributes to discrimination against foreign-born employees; and unattractiveness of the program to employers. In 2006, the SSA Inspector General found that the SSA database contained enough discrepancies to result in an incorrect finding in four percent of Basic Pilot Program submissions. Moreover, the records for supposedly non-U.S. citizens showed seven percent were actually U.S. citizens who had not updated their citizenship status. Currently, approximately 17,000 businesses nationwide use the Basic Pilot Program. The Act will add 130,000-150,000 businesses to the Program, and the State of Arizona believes that this "could strain the system." Letter from Governor Janet Napolitano to Speaker

Nancy Peolosi and Majority Leader Harry Reid, July 2, 2007, attached as Exhibit B.

Effective Date and Harm

28. Both the prohibition on intentionally or knowingly employing an unauthorized alien and the verification requirement in Section 2 of the Act become effective on January 1, 2008. Ariz. Rev. Stat. §§23-212(D), §23-214. Under Section 3 of the Act, the Department of Revenue is to provide notice of Section 2 of the Act to every employer on or before October 1, 2007.

29. The Act will have at least the following adverse effects: (a) cause workers who are eligible for employment, particularly foreign-born workers and national origin minorities, not to be hired in the first place, to lose their jobs, and to have to undertake additional, state-created efforts to demonstrate that they are authorized to work; and (b) impose additional costs and obligations on employers not required by federal law.

FIRST CLAIM FOR RELIEF

(Article VI, Section 2, of the United States Constitution; 42 U.S.C. §1983)

30. Plaintiffs re-allege and incorporate by reference ¶¶1 through 29.

31. Article VI, Section 2, of the United States Constitution, known as the Supremacy Clause, provides: "This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall

be bound thereby, any Thing in the Constitution of Laws of any State to the Contrary notwithstanding."

32. The Supremacy Clause mandates that federal law preempts any state regulation of any area over which Congress has expressly or impliedly exercised exclusive authority or which is constitutionally reserved to the federal government.

33. The power to regulate immigration is an exclusively federal power that is inherent in the nation's sovereignty and derives from the Constitution's grant to the federal government of the power to "establish a uniform Rule of Naturalization," U.S. Const. art. I, §8, cl. 4., and to "regulate Commerce with foreign Nations," *id.*, cl. 3.

34. Pursuant to its exclusive power over matters of immigration, the federal government has established a comprehensive system of laws, regulations, procedures, and administrative agencies that determine, subject to judicial review, whether and under what conditions a person may enter and live in the United States, including the Immigration and Nationality Act ("INA"), 8 U.S.C. §1101, *et seq*. In 1986, for the first time, Congress prohibited employers from knowingly hiring unauthorized aliens and established a detailed employment verification process with sanctions for employing unauthorized aliens. Immigration Reform and Control Act of 1986 ("IRCA"), 8 U.S.C. §§1324a-1324b.

35. The INA as amended by IRCA sets forth a comprehensive employer sanctions scheme that includes safeguards such as a "safe harbor" provision for employers who are presented with facially valid documents; restrictions on reverification of employees after they are hired; extensive antidiscrimination

provisions; prohibitions on employers requesting additional documents once an employee presents minimally adequate documentation; a 10-day cure period for good-faith violations; and a graduated series of penalties.

36. Before finding an employer in violation, federal immigration law requires notice, an opportunity for a hearing with witnesses and evidence before a federal administrative law judge, a finding that a violation has occurred based on a preponderance of the evidence, a chance for an administrative appeal, and an opportunity for review in the appropriate United States Court of Appeals. 8 U. S.C. §1324a(e)(2)-(3), (7)-(8).

37. The comprehensive federal employer sanctions scheme does not require that employers verify the immigration status of certain categories of workers, such as independent contractors and casual domestic workers. 8 C.F.R. §274a.1(f), (h), (j).

38. Under the Supremacy Clause, the federal government has the authority to enforce immigration statutes and regulations, confer benefits, make discretionary determinations, undertake adjudication, and otherwise administer the federal immigration laws.

39. The federal government retains and exercises the power to investigate employment of unauthorized aliens at workplaces and has publicly raided workplaces allegedly employing undocumented aliens.

40. The laws, procedures, and policies created by the federal government confer rights in a careful balance reflecting the national interest. The Legal Arizona Workers Act's prohibition on employers intentionally or knowingly employing an unauthorized alien and requirement that employers verify

employment eligibility threaten that balance and are preempted.

41. IRCA provides for express preemption as follows: "The provisions of this section preempt any State or local law imposing civil or criminal sanctions (other than through licensing and similar laws) upon those who employ, or recruit or refer for a fee for employment, unauthorized aliens." 8 U.S.C. §1324a (h)(2).

42. Under IRCA's preemption provision, licensing penalties are permitted *only* when the federal government has found an employer to have violated IRCA.

43. The Legal Arizona Workers Act purports to allow licensing penalties for employers that intentionally or knowingly employ an unauthorized alien even if the federal government has not found those employers to have violated IRCA, and is therefore expressly preempted.

44. The Act's definition of "license" (Ariz. Rev. Stat. §23-211(7)) extends the suspension or revocation sanction to many aspects of business that are not "licensing and similar laws" as used by Congress in 8 U.S.C. §1324a(h)(2), and is therefore also expressly preempted for this reason.

45. Moreover, the Act imposes additional sanctions on businesses beyond those based on licenses, and is expressly preempted for this reason as well.

46. The Act's institution of licensing penalties for employers that intentionally or knowingly employ an unauthorized alien and the requirement that employers verify employment are impliedly preempted because they:

a. Amount to an attempt to regulate immigration and its incidents.

b. Operate in a field occupied by the federal government through Congress' actions with respect to prohibiting the employment of unauthorized workers and verifying employment eligibility.

c. Stand as an obstacle to federal law by posing a number of actual obstacles to the objectives of Congress, including:

i. The Act will burden federal resources because the Arizona Attorney General or county attorney must investigate *every complaint* about unauthorized aliens through the federal inquiry system. Ariz. Rev. Stat. §23-212(B). Under IRCA, only complaints "which, on their face, have a substantial probability of validity" or other violations "as the [U.S.] Attorney General determines to be appropriate," are investigated. 8 U.S.C. §1324a(e)(1).

ii. The Act's unauthorized alien provisions disrupt and override the carefully balanced system that Congress designed to guarantee due process, protect employees against discrimination, and minimize disruption to businesses. 8 U.S.C. §§1324a-1324b.

iii. The Act covers independent contractors and casual domestic workers. Ariz. Rev. Stat. §23-211(3). Federal law does not. 8 C.F.R. §274a.1(f), (h), (j).

iv. The Act's mandatory verification requirement contravenes Congress' manifest intent to establish a *voluntary* and *temporary* Basic Pilot Program.

v. The Act's mandatory verification requirement also threatens to strain the federal system by using the Basic Pilot Program in an unanticipated manner. As demonstrated by Exhibit B, the law will add

130,000 to 150,000 new businesses to the experimental Program, and even Governor Napolitano has cast doubt on the ability of the federal system to handle the volume of usage resulting from the Arizona law.

47. For the above and other reasons, the effect of the Act is to upset the system established by Congress by implementing Arizona's own enforcement mechanism, penalties, and interpretations in place of the federal system, detracting from and impeding the integrated scheme of regulation Congress created.

48. The Legal Arizona Workers Act's prohibition on employers intentionally or knowingly employing an unauthorized alien and requirement that employers verify employment eligibility violate the Supremacy Clause.

SECOND CLAIM FOR RELIEF

(Fourteenth Amendment to the United States Constitution; 42 U.S.C. §1983)

49. Plaintiffs re-allege and incorporate by reference ¶¶1 through 48.

50. The Due Process Clause of the Fourteenth Amendment to the United States Constitution guarantees certain fundamental rights, including the right to a meaningful hearing prior to the deprivation of liberty or property.

51. The right to work is a liberty and property interest protected by the Fourteenth Amendment.

52. The right to a business license is a property interest protected by the Fourteenth Amendment.

53. Under federal immigration law, a violation for employing an unauthorized alien is found only after a number of steps culminating in an administrative

law judge with expertise in immigration matters determining, "upon the preponderance of the evidence received," including any witnesses and production of evidence, that the violation had occurred. 8 U.S.C. §1324a(e)(2), (3). An employer can appeal this order administratively and seek judicial review in federal court. 8 U.S.C. § 1324a(e)(7)-(8).

54. The investigation and court procedures contemplated by the Legal Arizona Workers Act do not provide employers or employees with the opportunity to be heard regarding the work status of an employee and the license of an employer in a meaningful manner. An employee's work status is determined through a mere inquiry procedure to the federal government about citizenship or immigration status, which is the only matter an Arizona Superior Court may consider in deciding whether an employee is authorized or not. Ariz. Rev. Stat. §23-212(H). The inquiry procedure under 8 U.S.C. § 1373(c) does not provide the protections set forth in the preceding paragraph or other protections afforded by federal law.

55. The insufficient process afforded under the Legal Arizona Workers Act means that employers who may not be found to have violated IRCA could be found liable under the Act.

56. Any purported process provided by the Act relating to the determination of immigration status is illusory because state courts lack the authority to determine such status.

57. The Act's provisions on employing an unauthorized alien violate Due Process Rights.

PRAYER FOR RELIEF

WHEREFORE, Plaintiffs pray for the following relief:

A. A temporary and permanent injunction enjoining Defendants, their officials, agents, employees, assigns, and all persons acting in concert or participating with them from implementing or enforcing Sections 2 and 3 of the Legal Arizona Workers Act;

B. A declaration pursuant to 28 U.S.C. §§2201 and 2202 that Sections 2 and 3 of the Legal Arizona Workers Act are unlawful and invalid;

C. Reasonable attorneys' fees and expenses pursuant to 42 U.S.C. §1988;

D. Costs of suit; and

E. Such other and further relief as this Court may deem equitable, just, and proper.

Dated: September 4, 2007

Stephen P. Berzon
Jonathan Weissglass
ALTSHULER BERZON LLP

Kristina M. Campbell
Cynthia A. Valenzuela
MEXICAN AMERICAN LEGAL DEFENSE
AND EDUCATIONAL FUND

Linton Joaquin
Marielena Hincapié
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NATIONAL IMMIGRATION LAW CENTER

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Omar C. Jadwat
AMERICAN CIVIL LIBERTIES UNION
FOUNDATION—Immigrants' Rights Project

By: /s/ Kristina M. Campbell
Kristina M. Campbell

Attorneys for Plaintiffs

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

No. CV 07-1355-PHX-NVW
(Consolidated)
CV 07-1684-PHX-NVW

ARIZONA CONTRACTORS ASSOCIATION INC., an Arizona nonprofit corporation, et al.,
Plaintiffs,

vs.

JANET NAPOLITANO, Governor of the State of Arizona, and TERRY GODDARD, Attorney General of the State of Arizona,
Defendants.

Phoenix, Arizona
November 14, 2007
10:30 a.m.

BEFORE: THE HONORABLE NEIL V. WAKE
UNITED STATES DISTRICT JUDGE
(*Motion Hearing and Bench Trial*)

Official Court Reporter:
Laurie A. Adams, RMR, CRR
Sandra Day O'Connor U.S. Courthouse, Suite 312
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Phoenix, Arizona 85003-2151
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Proceedings Reported by Stenographic Court Reporter Transcript Prepared by Computer-Aided Transcription

[2] APPEARANCES:

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MEXICAN AMERICAN LEGAL DEFENSE AND EDUCATIONAL FUND
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For the Defendants:

OFFICE OF THE ATTORNEY GENERAL
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By: Christopher A. Munns, Esq.
1275 W. Washington
Phoenix, AZ 85007

Governor's General Counsel
By: Tim Nelson, Esq.

[3] PROCEEDINGS

THE COURTROOM DEPUTY: Civil Case CV 17-1355, Arizona Contractor's Association, Incorporated, et al., versus Janet Napolitano, et al., on for a motion hearing.

Counsel, please announce.

MR. SELDEN: Your Honor, may it please the Court, my name is David Selden. I'm with the law firm Ballard Spahr Andrews & Ingersoll. With me today are my colleagues, Lou Moffa, Julie Pace, and Heidi Nunn-Gilman.

We also have present in the courtroom a number of the parties. For the plaintiff, Arizona Chamber of Commerce, Jessica Pacheco; Arizona Contractors Association, David Jones; Arizona Employers For Immigration Reform, Jason LeBeck; Arizona Farm Bureau Federation, Jim Klinker and Kevin Rogers; Arizona Minority Contractors of America—excuse me — Associated Minority Contractors of America, Ricardo

Carlos; United States Chamber of Commerce vice-president of litigation, Robin Conrad. And Mac Magruder, excuse me, of Wake Up! Arizona.

MR. WEISSGLASS: Good morning, Your Honor. I'm Jonathan Weissglass for the other set of plaintiffs, Chicanos Por La Causa and Somos America. And with me today are Kristina Campbell, Karen Tumlin, Omar Jadwat, and Daniel Pochoda.

MS. O'GRADY: Your Honor, Mary O'Grady from the Arizona Attorney General's Office representing the defendants in this action.

[4] Here with me today are Tim Nelson representing the governor of Arizona, Chris Munns, assistant attorney general, and also Cathy O'Grady, special assistant attorney general.

THE COURT: All right. Good morning, counsel, and good morning to all.

This is the time set for trial, but by agreement of the parties, trial on written evidence and hearing on the consolidated motion for preliminary injunction and all other motions before the Court.

You have probably noticed we don't have lights here. We're living on the ambient light. But when we discovered that we had that problem I concluded that the convenience of having a large courtroom outweighed the inconvenience of requiring the lawyers to squint to read their notes. So we will proceed that way.

By agreement of the parties, the time is divided one half to each side, so I guess the plaintiffs each get a quarter and the defendants get the other half.

And also, I have set the amount of time that the parties requested, which is from now until 1:00. It is —

do any counsel have time constraints that would prohibit us from going longer if you wanted more time?

MR. SELDEN: No, Your Honor.

MR. WEISSGLASS: No, Your Honor.

THE COURT: All right. Because the message I have

* * *

[139] CERTIFICATE

I, LAURIE A. ADAMS, do hereby certify that I am duly appointed and qualified to act as Official Court Reporter for the United States District Court for the District of Arizona.

I FURTHER CERTIFY that the foregoing pages constitute a full, true, and accurate transcript of all of that portion of the proceedings contained herein, had in the above-entitled cause on the date specified therein, and that said transcript was prepared under my direction and control.

DATED at Phoenix, Arizona, this 21st day of November, 2007.

/s/ Laurie A. Adams
Laurie A. Adams, RMR, CRR

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

No. CV07-1355-PHX-NVW (lead)
No. CV07-1684-PHX-NVW (member)

ARIZONA CONTRACTORS ASSOCIATION, INC., an Arizona non-profit corporation; ARIZONA EMPLOYERS FOR IMMIGRATION REFORM, INC., an Arizona non-profit corporation; CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA, a Washington D.C. non-profit corporation; ARIZONA CHAMBER OF COMMERCE, an Arizona non-profit corporation; ARIZONA HISPANIC CHAMBER OF COMMERCE, INC., an Arizona non-profit corporation; ARIZONA FARM BUREAU FEDERATION, an Arizona non-profit corporation; ARIZONA RESTAURANT AND HOSPITALITY ASSOCIATION, an Arizona non-profit corporation; ASSOCIATED MINORITY CONTRACTORS OF AMERICA, an Arizona non-profit limited liability company; ARIZONA ROOFING CONTRACTORS ASSOCIATION, an Arizona non-profit corporation; NATIONAL ROOFING CONTRACTORS' ASSOCIATION, an Illinois not-for-profit corporation; WAKE UP ARIZONA! INC., an Arizona non-profit corporation; and ARIZONA LANDSCAPE CONTRACTORS ASSOCIATION, INC., an Arizona non-profit corporation,

Plaintiffs,

vs.

JANET NAPOLITANO, Governor of the State of Arizona; TERRY GODDARD, Attorney General of the State of Arizona,

Defendants.

CHICANOS POR LA CAUSA, INC.; and
SOMOS AMERICA,

Plaintiffs,

vs.

JANET NAPOLITANO, in her official capacity as Governor of the State of Arizona; TERRY GODDARD, in his official capacity as Attorney General of the State of Arizona; and GALE GARRIOTT, in his official capacity as the Director of the Arizona Department of Revenue,

Defendants.

JUDGMENT IN A CIVIL CASE

___ Jury Verdict. This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

_X_ Decision by Court. This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED that pursuant to the Court's order dated December 7, 2007, judgment is entered against plaintiffs. Plaintiffs to take nothing, and complaint and action are dismissed without prejudice for lack of subject matter jurisdiction, there being no justiciable case or controversy against the Defendants.

12/7/07

RICHARD H. WEARE
District Court Executive/Clerk

s/ Sally Turner
By: Deputy Clerk

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

Case No. __

ARIZONA CONTRACTORS ASSOCIATION, INC., an Arizona non-profit corporation, ARIZONA EMPLOYERS FOR IMMIGRATION REFORM, INC., an Arizona non-profit corporation, CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA, a Washington D.C. non-profit corporation, ARIZONA CHAMBER OF COMMERCE, an Arizona non-profit corporation, ARIZONA HISPANIC CHAMBER OF COMMERCE, INC., an Arizona non-profit corporation, ARIZONA FARM BUREAU FEDERATION, an Arizona non-profit corporation, ARIZONA RESTAURANT AND HOSPITALITY ASSOCIATION, an Arizona non-profit corporation, ASSOCIATED MINORITY CONTRACTORS OF AMERICA, an Arizona non-profit limited liability company; ARIZONA ROOFING CONTRACTORS ASSOCIATION, an Arizona non-profit corporation, NATIONAL ROOFING CONTRACTORS' ASSOCIATION, an Illinois not-for-profit corporation, WAKE UP ARIZONA! INC., an Arizona non-profit corporation, and ARIZONA LANDSCAPE CONTRACTORS ASSOCIATION, INC., an Arizona non-profit corporation.

Plaintiffs,

v.

CRISS CANDELARIA, Apache County Attorney, ED RHEINHEIMER, Cochise County Attorney, TERENCE C. HANER, Coconino County Attorney, DAISY FLORES, Gila County Attorney, KENNY ANGLE, Graham County Attorney, DEREK D. RAPIER, Greenlee County Attorney, MARTIN BRANNAN, LaPaz County

Attorney, ANDREW P. THOMAS, Maricopa County Attorney, MATTHEW J. SMITH, Mohave County Attorney, JAMES CURRIER, Navajo County Attorney, BARBARA LAWALL, Pima County Attorney, JAMES P. WALSH, Pinal County Attorney, GEORGE SILVA, Santa Cruz County Attorney, SHEILA POLK, Yavapai County Attorney, JON SMITH, Yuma County Attorney, TERRY GODDARD, Attorney General of the State of Arizona, and FIDELIS V. GARCIA, Director of the Arizona Registrar of Contractors,

Defendants.

COMPLAINT

1. Violation of Procedural Due Process under U.S. Constitution
2. Violation of Procedural Due Process under Arizona Constitution
3. Violation of Commerce Clause of U.S. Constitution
4. Violation of Supremacy Clause of U.S. Constitution/Federal Pre-Emption
5. Violation of Separation of Powers of Arizona Constitution
6. Violation of Fourth Amendment of U.S. Constitution

For their Complaint against CRISS CANDELARIA, Apache County Attorney, ED RHEINHEIMER, Cochise County Attorney, TERENCE C. HANER, Coconino County Attorney, DAISY FLORES, Gila County Attorney, KENNY ANGLE, Graham County Attorney, DEREK D. RAPIER, Greenlee County Attorney, MARTIN BRANNAN,

LaPaz County Attorney, ANDREW P. THOMAS, Maricopa County Attorney, MATTHEW J. SMITH, Mohave County Attorney, JAMES CURRIER, Navajo County Attorney, BARBARA LAWALL, Pima County Attorney, JAMES P. WALSH, Pinal County Attorney, GEORGE SILVA, Santa Cruz County Attorney, SHEILA POLK, Yavapai County Attorney, JON SMITH, Yuma County Attorney, the HONORABLE TERRY GODDARD, Attorney General of the State of Arizona, (the "State"), and FIDELIS V. GARCIA, Director, Arizona Registrar of Contractors, Plaintiffs the Arizona Contractors Association, Inc. ("Arizona Contractors Association"), Arizona Employers for Immigration Reform, Inc. ("AZEIR"), Chamber of Commerce of the United States of America ("U.S. Chamber of Commerce"), Arizona Chamber of Commerce, Arizona Hispanic Chamber of Commerce, Inc. ("Arizona Hispanic Chamber of Commerce"), Arizona Farm Bureau Federation ("Arizona Farm Bureau"), Arizona Restaurant and Hospitality Association, Associated Minority Contractors of America ("Associated Minority Contractors"), Arizona Roofing Contractors Association, the National Roofing Contractors' Association ("National Roofing Contractors' Association"), Wake Up Arizona! Inc. ("Wake Up Arizona!"), and the Arizona Landscape Contractors Association, Inc. ("Arizona Landscaping Contractors Association"), (hereinafter collectively referred to as "Plaintiffs") allege as follows:

SUMMARY

1. Plaintiffs bring this case to uphold and to prevent violations of the Constitution of the United States, the laws of the United States, and the Constitution of the State of Arizona.

2. On July 2, 2007, the Honorable Janet Napolitano, the Governor of Arizona, signed into law HB 2779, a bill passed by the Arizona Legislature on June 20, 2007, codified in relevant part at A.R.S. § 23-211 to 23-214 (hereinafter the "Legal Arizona Workers Act").

3. The Legal Arizona Workers Act violates the United States and Arizona Constitutions and is preempted by federal law.

4. The Legal Arizona Workers Act deprives Plaintiffs and others of property without due process of law.

5. The Legal Arizona Workers Act regulates and interferes with interstate commerce.

6. The Legal Arizona Workers Act violates the Supremacy Clause because it conflicts with and is preempted by federal law.

7. The Legal Arizona Workers Act violates the separation of powers doctrine of the Arizona Constitution.

8. Plaintiffs seek and are entitled to a declaratory judgment and a preliminary and permanent injunction to declare the Legal Arizona Workers Act unconstitutional and illegal and to enjoin the County Attorneys and the Attorney General from enforcing the Legal Arizona Workers Act.

PARTIES, JURISDICTION AND VENUE.

9. Plaintiff the Arizona Contractors Association is a non profit corporation incorporated under the laws of the State of Arizona, with its principal place of business located in the State of Arizona.

10. The Arizona Contractors Association is an employer that employs employees in the State of Arizona. It transacts business in Arizona and holds what are deemed to be licenses under A.R.S. § 23-211(7).

11. The Arizona Contractors Association is an association of members ("Arizona Contractors Association Members"). Arizona Contractors Association Members employ employees in the State of Arizona, transact business in Arizona, and hold licenses and permits from the State and/or its political subdivisions.

12. The Arizona Contractors Association serves as a public policy advocate on behalf of its members and urges the Arizona Legislature and Executive Branch agencies to adopt and implement policies that promote a favorable legal and business climate in Arizona for the benefit of its members.

13. Plaintiff AZEIR is a non profit corporation incorporated under the laws of the State of Arizona, with its principal place of business located in the State of Arizona.

14. AZEIR is an association of members ("AZEIR Members"). AZEIR Members employ employees in the State of Arizona, transact business in Arizona, and hold licenses and permits from the State and/or its political subdivisions.

15. AZEIR serves as a public policy advocate on behalf of its members and urges the Arizona Legislature and Executive Branch agencies to adopt and implement policies that promote a favorable legal and business climate in Arizona for the benefit of its members.

16. Plaintiff the U.S. Chamber of Commerce is a non profit corporation incorporated under the laws of the District of Columbia with its principal place of business located in Washington D.C.

17. The U.S. Chamber of Commerce is the world's largest federation of businesses, professional organizations, and state and local chambers of commerce. The U.S. Chamber of Commerce represents an underlying membership of more than three million businesses and organizations of every size in every industrial sector and geographic region of the country, including Arizona, and its members transact business in Arizona and hold what are deemed to be licenses under A.R.S. § 23-211(7).

18. The U.S. Chamber of Commerce membership includes associations, chambers of commerce and direct business members. The U.S. Chamber of Commerce serves as a public policy advocate on behalf of its members. It advocates the interests of the business community, including advocating the interests of its members in courts across the nation in cases involving issues of national concern to American businesses.

19. The U.S. Chamber of Commerce has also been involved heavily in efforts to seek to achieve federal immigration legislation and laws that are uniform, fair, and appropriate to the needs of businesses.

20. Plaintiff the Arizona Chamber of Commerce is a non profit corporation incorporated under the laws of the State of Arizona, with its principal place of business located in the State of Arizona.

21. The Arizona Chamber of Commerce employ employees in the State of Arizona, transact business

in Arizona, and holds what are deemed to be licenses under A.R.S. § 23-211(7).

22. The Arizona Chamber of Commerce is an association of members ("Arizona Chamber of Commerce Members"). Arizona Chamber of Commerce Members employ employees in the State of Arizona, transact business in Arizona, and hold licenses and permits from the State an/or its political subdivision.

23. Arizona Chamber of Commerce Members employ employees in the State of Arizona, transact business in Arizona, and hold licenses and permits from the State and/or its political subdivisions.

24. The Arizona Chamber of Commerce serves as a public policy advocate on behalf of its members and urges the Arizona Legislature and Executive Branch agencies to adopt and implement policies that promote a favorable legal and business climate in Arizona for the benefit of its members.

25. Plaintiff the Arizona Hispanic Chamber of Commerce is a non profit corporation incorporated under the laws of the State of Arizona, with its principal place of business located in the State of Arizona.

26. The Arizona Hispanic Chamber of Commerce is an employer that employs employees in the State of Arizona. It transacts business in Arizona and holds what are deemed to be licenses under A.R.S. § 23-211(7).

27. The Arizona Hispanic Chamber of Commerce is an association of members ("Arizona Hispanic Chamber of Commerce Members"). Arizona Hispanic Chamber of Commerce Members employ employees in the State of Arizona, transact business in Arizona, and hold licenses and permits from the State and/or its political subdivisions.

28. The Arizona Hispanic Chamber of Commerce serves as a public policy advocate on behalf of its members and urges the Arizona Legislature and Executive Branch agencies to adopt and implement policies that promote a favorable legal and business climate in Arizona for the benefit of its members.

29. Plaintiff the Arizona Farm Bureau is a non profit corporation incorporated under the laws of the State of Arizona, with its principal place of business located in the State of Arizona.

30. The Arizona Farm Bureau is an employer that employs employees in the State of Arizona. It transacts business in Arizona and holds what are deemed to be licenses under A.R.S. § 23-211(7).

31. The Arizona Farm Bureau is an association of members ("Arizona Farm Bureau Members"). Arizona Farm Bureau members employ employees in the State of Arizona, transact business in Arizona, and hold licenses and permits from the State and/or its political subdivisions.

32. The Arizona Farm Bureau serves as a public policy advocate on behalf of its members and urges the Arizona Legislature and Executive Branch agencies to adopt and implement policies that promote a favorable legal and business climate in Arizona for the benefit of its members.

33. Plaintiff the Arizona Restaurant and Hospitality Association is a non profit corporation incorporated under the laws of the State of Arizona, with its principal place of business located in the State of Arizona.

34. The Arizona Restaurant and Hospitality Association is an employer that employs employees in the

State of Arizona. It transacts business in Arizona and holds what are deemed to be licenses under A.R.S. § 23-211(7).

35. The Arizona Restaurant and Hospitality Association is an association of members ("Arizona Restaurant and Hospitality Association Members"). The Arizona Restaurant and Hospitality Association Members employ employees in the State of Arizona, transact business in Arizona, and hold licenses and permits from the State and/or its political subdivisions.

36. The Arizona Restaurant and Hospitality Association serves as a public policy advocate on behalf of its members and urges the Arizona Legislature and Executive Branch agencies to adopt and implement policies that promote a favorable legal and business climate in Arizona for the benefit of its members.

37. Plaintiff the Associated Minority Contractors is a non profit corporation incorporated under the laws of the State of Arizona, with its principal place of business located in the State of Arizona.

38. Associated Minority Contractors is an employer that employs employees in the State of Arizona. It transacts business in Arizona and holds what are deemed to be licenses under A.R.S. § 23-211(7).

39. Associated Minority Contractors is an association of members ("Associated Minority Contractors Members"). Associated Minority Contractors Members employ employees in the State of Arizona, transact business in Arizona, and hold licenses and permits from the State and/or its political subdivisions.

40. Associated Minority Contractors serves as a public policy advocate on behalf of its members and urges the Arizona Legislature and Executive Branch agencies to adopt and implement policies that promote a favorable legal and business climate in Arizona for the benefit of its members.

41. Plaintiff the Arizona Roofing Contractors Association is a non profit corporation incorporated under the laws of the State of Arizona, with its principal place of business located in the State of Arizona.

42. The Arizona Roofing Contractors Association is an employer that employs employees in the State of Arizona. It transacts business in Arizona and holds what are deemed to be licenses under A.R.S. § 23-211(7).

43. The Arizona Roofing Contractors Association is an association of members ("Arizona Roofing Contractors Association Members"). Arizona Roofing Contractors Association Members employ employees in the State of Arizona, transact business in Arizona, and hold licenses and permits from the State and/or its political subdivisions.

44. The Arizona Roofing Contractors Association serves as a public policy advocate on behalf of its members and urges the Arizona Legislature and Executive Branch agencies to adopt and implement policies that promote a favorable legal and business climate in Arizona for the benefit of its members.

45. Plaintiff the National Roofing Contractors' Association is a not for profit corporation incorporated under the laws of the State of Illinois, with its principal place of business located in the State of Illinois.

46. The National Roofing Contractors' Association is an association of roofing, roof deck, and waterproofing contactors, industry-related associate members, including manufacturers, distributors, architects, engineers, and others. The National Roofing Contractors' Association has more than 4,600 members from all 50 states and 54 countries and is affiliated with 105 local, state, regional and international roofing contractor associates. Its members transact business in Arizona and hold what are deemed to be licenses under A.R.S. § 23-211(7).

47. The National Roofing Contractors' Association serves as a public policy advocate on behalf of its members.

48. Plaintiff Wake Up Arizona! is a non profit corporation incorporated under the laws of the State of Arizona, with its principal place of business located in the State of Arizona.

49. Wake Up Arizona! Transacts business in Arizona and holds what are deemed to be licenses under A.R.S. § 23-211(7).

50. Wake Up Arizona! is an association of members ("Wake Up Arizona! Members"). Wake Up Arizona! Members employ employees in the State of Arizona, transact business in Arizona, and hold licenses and permits from the State and/or its political subdivisions.

51. Wake Up Arizona! serves as a public policy advocate on behalf of its members and urges the Arizona Legislature and Executive Branch agencies to adopt and implement policies that promote a favorable legal and business climate in Arizona for the benefit of its members.

52. Plaintiff the Arizona Landscape Contractors Association is a non profit corporation incorporated under the laws of the State of Arizona, with its principal place of business located in the State of Arizona.

53. The Arizona Landscape Contractors Association is an employer that employs employees in the State of Arizona. It transacts business in Arizona and holds what are deemed to be licenses under A.R.S. § 23-211(7).

54. The Arizona Landscape Contractors Association is an association of members ("Arizona Landscape Contractors Association Members"). The Arizona Landscape Contractors Association Members employ employees in the State of Arizona, transact business in Arizona, and hold licenses and permits from the State and/or its political subdivisions.

55. The Arizona Landscape Contractors Association serves as a public policy advocate on behalf of its members and urges the Arizona Legislature and Executive Branch agencies to adopt and implement policies that promote a favorable legal and business climate in Arizona for the benefit of its members.

56. Defendant Criss Candelaria is the County Attorney for Apache County, Arizona. He is named herein as a Defendant in his capacity as County Attorney.

57. Defendant Ed Rheinheimer is the County Attorney for Cochise County, Arizona. He is named herein as a Defendant in his capacity as County Attorney.

58. Defendant Terence C. Hance is the County Attorney for Coconino County, Arizona. He is named herein as a Defendant in his capacity as County Attorney.

59. Defendant Daisy Flores is the County Attorney for Gila County, Arizona. She is named herein as a Defendant in her capacity as County Attorney.

60. Defendant Kenny Angle is the County Attorney for Graham County, Arizona. He is named herein as a Defendant in his capacity as County Attorney.

61. Defendant Derek D. Rapier is the County Attorney for Greenlee County, Arizona. He is named herein as a Defendant in his capacity as County Attorney.

62. Defendant Martin Brannan is the County Attorney for LaPaz County, Arizona. He is named herein as a Defendant in his capacity as County Attorney.

63. Defendant Andrew Thomas is the County Attorney for Maricopa County, Arizona. He is named herein as a Defendant in his capacity as County Attorney.

64. Defendant Andrew Thomas has entered into an agreement with the Maricopa County Sheriff, Joe Arpaio, under which Thomas has delegated to the Sheriff's office certain investigation and enforcement authority that was conferred upon Thomas in the Legal Arizona Workers Act. The actions of the Maricopa County Sheriff's office in enforcing the Legal Arizona Workers Act are therefore conducted as an agent of Thomas and Thomas is liable for such actions.

65. Defendant Matthew J. Smith is the County Attorney for Mohave County, Arizona. He is named herein as a Defendant in his capacity as County Attorney.

66. Defendant James Currier is the County Attorney for Navajo County, Arizona. He is named herein as a Defendant in his capacity as County Attorney.

67. Defendant Barbara LaWall is the County Attorney for Pima County, Arizona. She is named herein as a Defendant in her capacity as County Attorney.

68. Defendant James P. Walsh is the County Attorney for Pinal County, Arizona. He is named herein as a Defendant in his capacity as County Attorney.

69. Defendant George Silva is the County Attorney for Santa Cruz County, Arizona. He is named herein as a Defendant in his capacity as County Attorney.

70. Defendant Sheila Polk is the County Attorney for Yavapai County, Arizona. She is named herein as a Defendant in her capacity as County Attorney.

71. Defendant Jon Smith is the County Attorney for Yuma County, Arizona. He is named herein as a Defendant in his capacity as County Attorney.

72. Defendant Terry Goddard is the Attorney General of the State of Arizona (the "Attorney General"). He is named herein as a Defendant in his capacity as Attorney General.

73. Defendant Fidelis V. Garcia is the Director of the Arizona Registrar of Contractors. He is named herein as a Defendant in his capacity as Director of the Arizona Registrar of Contractors.

74. Each Plaintiff and the members of each Plaintiff are affected by the actions of the State of Arizona in enacting into law the Legal Arizona Workers Act.

75. Each Plaintiff has standing to sue in this action.

76. The Due Process, Commerce Clause, and Supremacy/Preemption claims of Plaintiffs arise under the Constitution and laws of the United States. As a result, Plaintiffs have a right to sue arising under 42 U.S.C. § 1983.

77. This Court has jurisdiction over the Due Process, Commerce Clause and Supremacy Clause/Preemption claims of Plaintiffs pursuant to 28 U.S.C. §§ 1331 and 1343 because they arise under the Constitution and laws of the United States.

78. This Court has jurisdiction over the Plaintiffs' state law claims pursuant to 28 U.S.C. § 1367.

79. Venue is proper in this Court pursuant to 28 U.S.C. § 1391(b).

80. Pursuant to 28 U.S.C. §§ 2201-2202, the Court may issue a declaratory judgment and further necessary or proper relief.

ALLEGATIONS COMMON TO ALL CLAIMS

81. On July 2, 2007, the Honorable Janet Napolitano, the Governor of Arizona, signed into law HB 2779, a bill passed by the Arizona Legislature on June 20, 2007, known as the Legal Arizona Workers Act, codified in relevant part at A.R.S. § 23-211 to 23-214.

82. A.R.S. § 23-212(A) prohibits employers from "knowingly" or "intentionally" employing an unauthorized alien.

83. A.R.S. § 23-212(B) requires the Arizona Attorney General and the County Attorneys of the several counties in Arizona to investigate all complaints that

an employer is knowingly or intentionally employing an unauthorized alien.

84. A.R.S. § 23-212(B)-(C) requires County Attorneys to prosecute all complaints that are considered to be "not frivolous."

85. When investigating complaints pursuant to A.R.S. § 23-212(B), the County Attorneys or the Attorney General must verify an individual's work authorization exclusively by communicating with the federal government pursuant to 8 U.S.C. § 1373(c).

86. The County Attorneys take an oath of office and are to faithfully uphold and enforce the law.

87. Under the Legal Arizona Workers Act, effective January 1, 2008, employers that are deemed to have "knowingly" or "intentionally" hired unauthorized aliens may have their business licenses suspended for a first violation of A.R.S. § 23-212(A) and permanently revoked for a second violation of A.R.S. § 23-212(A).

88. A.R.S. § 23-214 requires that after December 31, 2007, every employer must verify the employment eligibility of employees through the federal government's otherwise voluntary E-Verify Program.

89. In order to enroll in E-Verify, Arizona employers must access E-Verify through a computer and the use of the Internet.

90. Some of Plaintiffs' members are small businesses that do not own a computer and do not have Internet access to be able to use E-Verify at their business.

91. One or more of Plaintiffs' Members have already incurred expenses to come into compliance with the Legal Arizona Workers Act's requirements

that employers use E-Verify, including training, equipment, outsourcing the E-Verify process and other expenses.

92. Using E-Verify impose burdens on employers, including Plaintiffs and their members. These include the costs for the equipment necessary to use E-Verify and the staff time necessary for training and using E-Verify.

93. The annual operating costs for E-Verify is $1,800.

94. Arizona Contractors Association Members, Associated Minority Contractors Members, Arizona Roofing Contractors Association Members, National Roofing Contractors' Association Members and some of the other Plaintiffs' members are contractors that hold contractors licenses from the State of Arizona.

95. Pursuant to A.R.S. § 32-1154(a)(12), the failure of a contractor to comply with any labor law of the state government is grounds for revocation or suspension of the Plaintiffs' Members' contractors license. The failure to use E-Verify as required by the Legal Arizona Workers Act would constitute the failure to comply with a labor law.

96. On information and belief, County Attorney Criss Candelaria has already received complaints that one or more Plaintiffs or one or more of Plaintiffs' members is employing an unauthorized alien.

97. On information and belief, County Attorney Ed Rheinheimer has already received complaints that one or more Plaintiffs or one or more of Plaintiffs' members is employing an unauthorized alien.

98. On information and belief, County Attorney Terence Hance has already received complaints that

one or more Plaintiffs or one or more of Plaintiffs' members is employing an unauthorized alien.

99. On information and belief, County Attorney Daisy Flores has already received complaints that one or more Plaintiffs or one or more of Plaintiffs' members is employing an unauthorized alien.

100. On information and belief, County Attorney Kenny Angle has already received complaints that one or more Plaintiffs or one or more of Plaintiffs' members is employing an unauthorized alien.

101. On information and belief, County Attorney Derek Rapier has already received complaints that one or more Plaintiffs or one or more of Plaintiffs' members is employing an unauthorized alien.

102. On information and belief, County Attorney Martin Brannan has already received complaints that one or more Plaintiffs or one or more of Plaintiffs' members is employing an unauthorized alien.

103. On information and belief, County Attorney Andrew Thomas has already received complaints that one or more Plaintiffs or one or more of Plaintiffs' members is employing an unauthorized alien.

104. On information and belief, the Maricopa County Sheriff's Office with whom Maricopa County Attorney Andrew Thomas has signed an agreement that the Sheriff would help investigate complaints pursuant to the Legal Arizona Workers Act, has already received complaints that one or more Plaintiffs or one or more of Plaintiffs members is employing an unauthorized alien.

105. On information and belief, County Attorney Matthew J. Smith has already received complaints

that one or more Plaintiffs or one or more of Plaintiffs' members is employing an unauthorized alien.

106. On information and belief, County Attorney James Currier has already received complaints that one or more Plaintiffs or one or more of Plaintiffs' members is employing an unauthorized alien.

107. On information and belief, County Attorney Barbara LaWall has already received complaints that one or more Plaintiffs or one or more of Plaintiffs' members is employing an unauthorized alien.

108. On information and belief, County Attorney James P. Walsh has already received complaints that one or more Plaintiffs or one or more of Plaintiffs' members is employing an unauthorized alien.

109. On information and belief, County Attorney George Silva has already received complaints that one or more Plaintiffs or one or more of Plaintiffs' members is employing an unauthorized alien.

110. On information and belief, County Attorney Sheila Polk has already received complaints that one or more Plaintiffs or one or more of Plaintiffs' members is employing an unauthorized alien.

111. On information and belief, County Attorney Jon Smith has already received complaints that one or more Plaintiffs or one or more of Plaintiffs' members is employing an unauthorized alien.

112. On information and belief, Attorney General Terry Goddard has already received complaints that one or more Plaintiffs or one or more of Plaintiffs' members is employing an unauthorized alien.

113. On information and belief, Defendants intend to fully and faithfully prosecute the law and violations of the Legal Arizona Workers Act.

114. On information and belief, one or more Defendants intend to investigate and prosecute one or more of Plaintiffs' members after January 1, 2008.

115. At least one member of one of the Plaintiff associations employs an undocumented worker, intends not to comply with the Legal Arizona Workers Act and has been threatened with prosecution by the office of the Maricopa County Sheriff and Maricopa County Attorney.

116. At least one member of one of the Plaintiff associations has received a voicemail message from a caller identifying himself as being with the Maricopa County Sheriff's office Illegal Immigration Task Force. The caller communicated that the Sheriff's office had received complaints about the employer hiring undocumented workers. The call was part of the investigation and enforcement activities pursuant to the Legal Arizona Workers Act. As previously alleged, any such actions by the Maricopa County Sheriff's office were conducted under the authority and as an agent of Defendant Andrew Thomas, County Attorney of Maricopa County.

117. Defendant Thomas, Maricopa County Attorney, has begun enforcement activities pursuant to the Arizona Legal Workers Act.

118. The enforcement activities by Defendant Thomas include receiving complaints and preparing to or actually beginning to investigate those complaints.

119. The enforcement activities of Defendant Thomas include preparations to bring claims against employers pursuant to A.R.S. § 23-212.

120. The enforcement activities of Defendant Thomas include preparations to investigate and bring claims against Plaintiffs and their members.

121. Plaintiffs are entitled to injunctive relief. They have a strong likelihood of success on the merits and will suffer irreparable harm if the Legal Arizona Workers Act is not enjoined and is enforced against employers in Arizona, including Plaintiffs.

122. Plaintiffs will suffer irreparable harm as a result of the potential enforcement of the Legal Arizona Workers Act, as a result of the legal uncertainty that they face due to the Legal Arizona Workers Act's vagueness and its provisions that conflict with other laws and the Constitution.

123. Plaintiffs are entitled to recover the costs and attorneys' fees of bringing this suit pursuant to 42 U.S.C.§ 1988.

FIRST CLAIM FOR RELIEF

VIOLATION OF PROCEDURAL DUE PROCESS GUARANTEES UNDER THE U.S. CONSTITUTION

124. Plaintiffs hereby incorporate by this reference all allegations of the preceding paragraphs of this Complaint, as if fully set forth herein.

125. Under the Fourteenth Amendment to the U.S. Constitution, state and local governments are prohibited from depriving any person of property without due process of law.

126. Corporations, including Plaintiffs and their members, are persons entitled to due process.

127. Licenses or permits from the State of Arizona and/or its political subdivisions are property interests

that are subject to the due process protections of the Fourteenth Amendment to the U.S. Constitution.

128. The County Attorneys, the Attorney General, the State of Arizona and its political subdivisions and other public officials are prohibited by the Fourteenth Amendment from suspending or revoking business licenses or permits unless the State or its political subdivisions provide due process of law to the holder of the license or permit.

129. Due process of law requires, at a minimum, that before any person, whether an individual, corporation or other business entity, may be deprived of a license or permit, the State must provide:

(a) Notice and a reasonable definite statement of the charges or matters at issue.

(b) Notice of the time and place of a hearing.

(c) The right to produce witnesses at a hearing.

(d) The right to examine witnesses at a hearing.

(e) The right to a full consideration and determination of the issues based on the evidence.

130. The Legal Arizona Workers Act does not provide Plaintiffs, their members, or other employers with due process before the State may deprive them of property interests.

131. In contrast to the Legal Arizona Workers Act, federal immigration law contains provisions to provide due process rights to employers. Under federal immigration law, before an employer is found to have violated the law, the employer is provided the following due process rights:

(a) A signed, written complaint must be filed with sufficient information to identify the complainant and the potential violator, including names and addresses.

(b) The federal government investigates only those complaints "which, on their face, have a substantial probability of validity." 8 U.S.C. § 1324a(c)(1)(B).

(c) After investigation the federal government may issue a Warning Notice or Notice of Intent to Fine.

(d) The Notice of Intent to Fine must include the basis for the charges, the statutory provisions alleged to have been violated, and the penalty to be imposed.

(e) The Notice of Intent to Fine must also notify the employer of its rights, including the right to counsel, that any statement may be used against the employer, and the employer's right to a hearing.

(f) The respondent employer has a right to request a hearing before a federal administrative law judge. 8 C.F.R. § 274a.9(e) and 8 U.S.C. § 1324a(e)(3).

(g) The employer has the right to an evidentiary hearing, with appellate review, as is customary in other federal administrative/ adjudicative proceedings.

(h) At the hearing, the employer has the right to present evidence and to cross-examine witnesses regarding the evidence presented against it.

132. Under the Legal Arizona Workers Act, Plaintiffs, their members, and other employers will not be provided any of the due process rights of federal law set forth in the preceding paragraph.

133. Under the Legal Arizona Workers Act, Plaintiffs, their members and other employers will be subject to an enforcement scheme that includes the following:

(a) Complaints may be initiated by any person without a signed written complaint, without any standards, without any requirements for the identification of the person(s) who is accused of not being authorized to work in this country, without any disclosure or identification of the basis for the allegation that an employee is not authorized to work, and without any requirement that any basis for the allegation must exist before an investigation must be initiated.

(b) Complaints may be initiated based solely on or primarily on race, national origin, language ability or characteristics, accent, physical appearance, clothing characteristic of an ethnic group, religious attire, racial or ethnic prejudice or other unlawful factors.

(c) Complaints may be initiated for reasons unrelated to the enforcement of immigration laws.

(d) The Attorney General and County Attorneys are compelled to investigate all complaints regardless of the lack of any basis for the complaint.

(e) The Attorney General and County Attorneys must investigate all complaints, even if the basis for the complaint is racial or ethnic prejudice or discrimination or any other improper unlawful motive.

(f) There is no notice of the initiation of an investigation to the employer or to the individual who is the subject of the investigation (the "Affected Employee").

(g) The investigation relating to whether an employee is authorized to work in the United States consists solely of a request by the Attorney General or a County Attorney to the federal government to check federal computer records pursuant to 8 U.S.C. § 1373(c).

(h) HB 2779 excludes the ability of the Attorney General or County Attorneys to consider any other evidence besides the response from the federal government pursuant to 8 U.S.C. § 1373(c) in determining whether an employee is authorized to work.

(i) The County Attorneys are compelled to prosecute the employer in every case in which a complaint was investigated and found "not frivolous."

(j) In any proceedings in Arizona courts to impose penalties under A.R.S. § 23-212(F), including the suspension or revocation of all business licenses or permits of Plaintiffs, their members, and other employers, A.R.S. § 23-212(H) restricts the evidence that may be considered.

(k) The Legal Arizona Workers Act provides in part, "On determining whether an employee is an unauthorized alien, the Court shall consider only the federal government's determination pursuant to 8 U.S.C. § 1373(c)." A.R.S. § 23-212(H). The Legal Arizona Workers Act also states that Arizona courts may take judicial notice of the federal government's so-called "determination" under 8 U.S.C. § 1373(c). *Id.*

(l) The Legal Arizona Workers Act does not give employers the right to call witnesses on their behalf to establish the work authorization of Affected Employees.

(m) The Legal Arizona Workers Act does not give Affected Employees the right to call witnesses on their behalf to establish their work authorization.

(n) The Legal Arizona Workers Act does not give employers or Affected Employees the right to cross-examine witnesses for the federal or state government on the issue of the Affected Employee's work authorization.

(o) The Legal Arizona Workers Act does not provide a procedure whereby an employer or Affected Employee may challenge erroneous "determinations" of immigration status.

(p) Due process rights are not provided to the employer or the Affected Employee under The Legal Arizona Workers Act.

(q) There is no "determination" made under 8 U.S.C. § 1373(c). The federal government's informational response under 8 U.S.C.

§ 1373(c) is not a determination, but is merely a reflection of whatever information is in the federal government's database.

(r) Due process rights are not provided before the federal government furnishes a response under 8 U.S.C. § 1373(c).

(s) The absence of any "determination" pursuant to 8 U.S.C. § 1373(c) is reflected by the fact that federal immigration law does not provide for any action to be taken by the federal government against a person or employer based upon response under 8 U.S.C. § 1373(c). Determinations by the federal government of whether an employer knowingly employed an unauthorized alien are made pursuant to 8 CFR § 274a.9, and require a hearing and due process, as set forth in paragraph 131 above. Determinations of an alien's status are made pursuant to administrative procedures that provide due process protections. Determinations are not made pursuant to 8 U.S.C. § 1373(c), and the federal immigration system does not provide a final determination of immigration status at the request of a state or local government.

(t) To find that an Arizona employer knowingly or intentionally employed an unauthorized alien, the Arizona Court will be required to make a determination that the Affected Employee is an unauthorized alien, but the Arizona Court has no authority to determine an alien's immigration status. Such status determinations may be made only by a federal immigration judge. 8 U.S.C.

§ 1229a(a)(1) and (a)(3). The Legal Arizona Workers Act does not provide due process to Employers and Affected Employees to subject them to a hearing in an Arizona Court that does not have jurisdiction to determine immigration status.

134. The procedures established pursuant to the Legal Arizona Workers Act do not satisfy the due process requirements of the United States Constitution.

135. It is a violation of Plaintiffs' due process rights for the State of Arizona to make mandatory the use of the federal government's otherwise voluntary electronic employment verification system known as E-Verify because the Legal Arizona Workers Act conflicts with federal law and information given to employers by the federal government regarding the voluntary nature of their participation in E-Verify, as alleged more fully in paragraphs 203-225 below.

136. It is a violation of Plaintiffs' due process rights for the Legal Arizona Workers Act to make mandatory the use of the federal government's E-Verify system because the laws of the State of Illinois prohibit the use of E-Verify unless and until it meets performance standards that it currently does not meet, as alleged more fully in paragraphs 220-224 below.

137. The Legal Arizona Workers Act violates the due process rights of members of Plaintiffs who have employees in both Arizona and Illinois because the Legal Arizona Workers Act places employers in the position of violating the laws of either Arizona or

Illinois and makes it impossible for such employers to comply with the laws of both states.

138. Plaintiffs are entitled to a declaratory judgment that the Legal Arizona Workers Act is unconstitutional because it violates the Fourteenth Amendment to the U.S. Constitution.

139. Plaintiffs are entitled to a preliminary and permanent injunction to enjoin the County Attorneys and Attorney General from taking actions to enforce or implement the Legal Arizona Workers Act.

SECOND CLAIM FOR RELIEF

VIOLATION OF PROCEDURAL DUE PROCESS GUARANTEES OF ARIZONA CONSTITUTION

140. Plaintiffs hereby incorporate by this reference all allegations of the preceding paragraphs of this Complaint, as if fully set forth herein.

141. Article II, § 4 of the Arizona Constitution prohibits state and local governments from depriving any person of property without due process of law.

142. Corporations, including Plaintiffs and their members, are persons entitled to due process.

143. Licenses or permits from the State of Arizona and/or its political subdivisions are property interests that are subject to the due process protections of Article II, § 4 of the Arizona Constitution.

144. The County Attorneys, the Attorney General, the Registrar of Contractors, the State of Arizona and its political subdivisions and other public officials are prohibited by Article II, § 4 of the Arizona Constitution from suspending or revoking business licenses or permits unless the State or its political subdivisions provide the holder of the license or permit due process of law.

145. The Defendants' actions that violate the Fourteenth Amendment to the U.S. Constitution, as alleged in paragraphs 124-139 above, also violate the Arizona Constitution.

146. The procedures established by the Legal Arizona Workers Act do not satisfy and are in conflict with provisions of existing Arizona law for the procedures that must be used and due process rights that must be provided in order for Defendants to suspend or revoke licenses or permits.

147. The procedures established under the Legal Arizona Worker Act do not satisfy the due process requirements of the Arizona Constitution.

148. Plaintiffs are entitled to a declaratory judgment that the Legal Arizona Workers Act is unconstitutional because it violates Article II § 4 of the Arizona Constitution.

149. Plaintiffs are entitled to a preliminary and permanent injunction to enjoin the County Attorneys and Attorney General from taking actions to enforce or implement the Legal Arizona Workers Act.

THIRD CLAIM FOR RELIEF

VIOLATION OF COMMERCE CLAUSE

150. Plaintiffs hereby incorporate by this reference all allegations of the preceding paragraphs of this Complaint, as if fully set forth herein.

151. The Commerce Clause of the U.S. Constitution vests Congress with the exclusive authority to "regulate Commerce . . . among the several states." U.S. Constitution, Art. I, § 8, cl. 3. The Commerce Clause forbids states and local governments, including the State of Arizona, from regulating or passing

laws that restrict or interfere with interstate commerce.

152. The Legal Arizona Workers Act purports to and will regulate interstate commerce.

153. Although the definition of employer contained in A.R.S. § 23-211(4) provides that the employer must have a license or permit from the State of Arizona, or one of its political subdivisions, and must have at least one employee in Arizona, the definition of employee in A.R.S. § 23-211(3) is limited to employees who were hired or who perform services within Arizona.

154. The definition of employee in A.R.S. § 23-211(3) includes "any person who performs employment services for an employer pursuant to an employment relationship between the employee and employer."

155. By its terms, the above definition of employee contained in A.R.S. § 23-211(3) includes all employees who work for any business that has one or more employees within the State of Arizona and a license or permit from the State of Arizona or one of its political subdivisions.

156. The definition of employee subject to regulation by the Legal Arizona Workers Act includes employees who work exclusively in states other than Arizona, who were hired in states other than Arizona and who have never worked in Arizona, but work for businesses that have at least one employee in Arizona and hold a license or permit from the Sate of Arizona or one of its political subdivisions.

157. The above definition of employee subject to regulation by the Legal Arizona Workers Act includes

employees who were hired in states other than Arizona and who later were transferred or relocated to Arizona to perform employment services in Arizona.

158. The above definition of employee subject to regulation by the Legal Arizona Workers Act includes employees who were hired in states other than Arizona and who perform work in Arizona on only an occasional basis.

159. Under the Legal Arizona Workers Act, the Attorney General or County Attorneys will be required to investigate complaints relating to employees who were hired in states other than the State of Arizona.

160. Under the Legal Arizona Workers Act, the Attorney General or County Attorneys will be required to investigate complaints relating to employees who were hired in states other than Arizona and who are residents of states other than Arizona and who perform services in Arizona on only an occasional or temporary basis or not at all.

161. Under the Legal Arizona Workers Act, the Attorney General or County Attorneys will be required to investigate complaints relating to employees who were hired in states other than Arizona and who perform services only in states other than Arizona, as there is nothing in the Legal Arizona Workers Act that restricts the regulation and enforcement of its provisions to employees who are performing services within the State of Arizona.

162. Under the Legal Arizona Workers Act, the enforcement actions of the State of Arizona will extend to employees or job sites in states other than Arizona, as there is nothing in the Legal Arizona

Workers Act that restricts the regulation and enforcement of its provisions to employees performing services in the State of Arizona or work sites in the State of Arizona.

163. Under the Legal Arizona Workers Act, Arizona businesses could lose their Arizona licenses for conduct that occurred wholly outside the State of Arizona and that the State of Arizona has no authority to regulate.

164. A.R.S. § 23-214 requires employers to use E-Verify to verify the employment eligibility of its employees after December 31, 2007.

165. The requirement that employers use E-Verify to verify the employment eligibility of its employees is not limited to employees in the State of Arizona, but applies to all employees of businesses that have at least one employee in Arizona and a license or permit issued by the State or one of its political subdivisions.

166. By requiring that employers use E-Verify to verify the work authorization of employees who do not perform services in Arizona and by extending investigations and enforcement actions to employees outside of Arizona, Arizona is regulating commerce that occurs wholly outside the State of Arizona and that the State of Arizona has no authority to regulate.

167. Plaintiffs are entitled to a declaratory judgment that the Legal Arizona Workers Act is unconstitutional because it violates the Commerce Clause of the U.S. Constitution due to its extraterritorial effects and control of commerce that occurs outside the borders of Arizona.

168. Plaintiffs are entitled to a preliminary and permanent injunction to enjoin the County Attorneys and Attorney General from taking actions to enforce or implement the Legal Arizona Workers Act.

FOURTH CLAIM FOR RELIEF

VIOLATIONS OF SUPREMACY CLAUSE OF U.S. CONSTITUTION AND PRE-EMPTION BY FEDERAL IMMIGRATION LAW

169. Plaintiffs hereby incorporate by this reference all allegations of the preceding paragraphs of this Complaint, as if fully set forth herein.

170. Under the Supremacy Clause of the U.S. Constitution, federal law may expressly or implicitly preempt state and local laws.

171. In accordance with its exclusive power over matters of immigration, the U.S. Congress has adopted, pursuant to the Immigration and Nationality Act, 8 U.S.C. § 1101 et seq., and other laws, a comprehensive system of laws, regulations, and procedures and has created administrative agencies that determine, subject to judicial review, whether and under what conditions individuals may enter, stay in, and work in the U.S. and a system of civil and criminal penalties for those violating the law, including employers who knowingly employ unauthorized aliens.

172. When enacting the Immigration Reform and Control Act, Congress expressly pre-empted state and local laws. The Immigration Reform and Control Act provides, in part, as follows: "[Federal law] pre-empts any state or local law imposing similar criminal sanctions (other than through licensing and similar laws)

upon those who employ unauthorized aliens." 8 U.S.C. § 1324a(h)(2).

173. The licensing exception was designed and intended to allow state governments to take action against the business license for employers "found to have violated the sanctions provision" of 8 U.S.C. § 1324a—essentially only after the employer had been found by the federal government to have violated the federal law.

174. The licensing exception to the preemption clause in 8 U.S.C. § 1324a(h)(2) does not allow states to pass laws prohibiting the employment of unauthorized aliens.

175. The federal government has enacted broad, comprehensive immigration laws that govern who is eligible to work in the United States and that govern the process by which employers must verify the eligibility of job applicants.

176. The federal government has occupied the field of immigration regulation through the Immigration and Nationality Act ("INA"), the Immigration Reform and Control Act of 1986 ("IRCA"), the Illegal Immigration Reform and Immigrant Responsibility Act ("IIRIRA"), and other laws, including occupying the field relating to prohibiting the employment of unauthorized workers and verifying the eligibility of job applicants.

177. The immigration laws, procedures, and policies created by the federal government regulate immigration and confer rights in a careful balance reflecting the national interest.

178. Congress carefully balanced the requirements and penalties in the federal immigration law with

consideration of the tension that immigration compliance and sanctions might cause relating to race, national origin, and citizenship discrimination.

179. The Constitution bars Defendants from altering or obstructing the federal government's carefully crafted comprehensive immigration regime.

180. The Constitution bars Defendants from enacting or enforcing laws that conflict with federal law, including federal immigration laws.

181. The Legal Arizona Workers Act conflicts with federal law and is therefore preempted by federal law and is unconstitutional pursuant to the Supremacy Clause of the U.S. Constitution.

182. Federal law governs the documents that employers must accept to make employment decisions regarding whether persons are authorized to work in this country.

183. Federal law prohibits employers from conducting any further investigation or taking any steps other than reviewing any of the 24 forms of documents that employees have the right, under federal law, to present to an employer to establish eligibility for employment in this country. Once an employee has satisfied the verification requirements of 8 U.S.C. § 1324a, employers are barred by federal law from seeking additional information regarding their authorization to work.

184. Federal law prohibits employers from making additional inquiries, conducting additional investigations, or taking additional steps to determine an applicant's or employee's eligibility to work in this country, other than (i) having examined the original documents that the employee chose to present, (ii) if

the employer voluntarily enters into an agreement, to utilize E-Verify, and (iii) taking certain steps in response to receiving a communication from the Social Security Administration that an employee's name does not match an employee's Social Security number.

185. Federal law prohibits the use of the Form I-9 for any law enforcement purpose other than for enforcement of IRCA or other specified federal laws. 8 U.S.C. § 1324a(d)(2)(F).

186. Federal law prohibits the use of the Form I-9 or any information on the I-9 except by the Department of Homeland Security, Department of Labor, or Department of Justice for purposes of enforcing IRCA or other specified federal laws. 8 U.S.C. § 1324a(b)(5).

187. The Legal Arizona Workers Act provides that employers who comply with the federal I-9 requirement have an affirmative defense that they did not knowingly or intentionally employ an unauthorized alien. A.R.S. § 23-212(J).[1]

188. The affirmative defense provided in A.R.S. § 23-212(J) conflicts with federal limitations on the use of the Form I-9 and thus is preempted by federal law.

189. The factors to be considered by Arizona courts in determining whether to suspend business licenses include "whether the employer made good faith efforts to comply with any applicable requirements," which necessarily will require the consideration of

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[1] A.R.S. 23-212(J) actually provides that good faith compliance with 8 U.S.C. § 1324b, the non-discrimination provisions of IRCA, is a good-faith defense. This is a typographical error. The law intended to refer to 8 U.S.C. § 1324a(b), the I-9 employment verification system.

the employer's compliance with the Form I-9. The foregoing enforcement provisions of A.R.S. § 23-212(F)(1)(d) conflicts with the federal limitations on the use of the Form I-9 and is thus preempted by federal law.

190. The federal government has failed to issue tamper-proof and forgery-proof forms of identification to persons that employers may rely upon to confirm with accuracy and reliability the identity of a person or the person's eligibility to work in the United States.

191. The State of Arizona has failed to issue tamper-proof and forgery-proof documents establishing the identity of residents of the State of Arizona.

192. Federal immigration law and federal employment discrimination laws prohibit employers from taking action to refuse to hire or discharge employees based upon their citizenship, national origin, race, ethnicity, color or other classifications protected by law.

193. The Legal Arizona Workers Act threatens the uniformity and primacy of the federal immigration system and conflicts with federal immigration law.

194. The Legal Arizona Workers Act stands as an obstacle to the uniform enforcement and application of federal immigration laws and the comprehensive regime created by Congress.

195. The Legal Arizona Workers Act imposes penalties on employers for Arizona's state-regulated immigration enforcement measures beyond and different than what the federal government requires.

196. The Legal Arizona Workers Act makes unlawful an additional immigration-related employment practice that is not prohibited under federal law, that of "intentionally" employing an unauthorized alien.

197. The prohibition in A.R.S. § 23-212(A) against "intentionally" employing an unauthorized alien is preempted by IRCA. It is inconsistent with the uniform enforcement of federal immigration law and Congress has already acted, through IRCA, to occupy the field regarding controlling the employment of aliens.

198. The definition of "license" in A.R.S. § 23-211(7) subject to being suspended or revoked includes items that are not licenses within any traditional sense of the word or as the term is used in 8 U.S.C. § 1324a(h)(2).

199. Articles of Incorporation, a grant of authority, a Certificate of Partnership, a Partnership Registration and Articles of Organization are not "licenses."

200. The Arizona Legislature exceeded the savings clause in 8 U.S.C. § 1324a(h)(2) when it defined "license" to include Articles of Incorporation, a grant of authority, a Certificate of Partnership, a Partnership Registration, and Articles of Organization.

201. Under The Legal Arizona Workers Act, Arizona courts could order the Arizona Corporation Commission to "suspend" corporations' Articles of Incorporation.

202. There is no legal meaning to "suspending" a corporation's Article of Incorporation. Either the corporation's charter exists or it does not. There is no in-between concept of a "suspended" Articles of Incorporation.

203. The federal government does not require employers to use E-Verify. It is a strictly voluntary program, except in the few cases where the federal government requires employers that violated the employment verification laws to use E-Verify as part of a settlement with the federal government.

204. Authorization for E-Verify expires November 30, 2008 at which time the program expires and will no longer exist without further action by the U.S. Congress before November 30, 2008.

205. The fact that the federal government does not require employers to use E-Verify evidences the intent of the federal government that E-Verify remain voluntary and that employers are not to be required to use E-Verify.

206. In order to use E-Verify, employers must enter into a contract with the federal government that is contained in a Memorandum of Understanding issued by the federal government.

207. The terms of the contract with the federal government for use of E-Verify obligate employers to use E-Verify in accordance with the federal government's requirements and procedures, including but not limited to the matters set forth in the federal government's Memorandum of Understanding and a 64-page User's Manual for E-Verify.

208. The federal government provides information to potential and actual users of E-Verify, via a computer internet connection, to inform potential and actual users of E-Verify about the terms and conditions for operation and use of E-Verify.

209. The information provided by the federal government to potential and actual users of E-Verify

specifically informs them that the use of E-Verify by employers is voluntary.

210. The Legal Arizona Workers Act is preempted by federal law and is unconstitutional under the Supremacy Clause, and is a denial of due process because of the conflicting and inconsistent provisions of the state and federal law and the conflicting and inconsistent information that employers receive from the State of Arizona and the federal government. The State of Arizona, by enacting the Legal Arizona Workers Act, and Defendants, by enforcing it, mandate that Arizona employers must log onto a federal website that provides Arizona employers with information from the federal government that is the opposite of and contradictory to the provisions of the Legal Arizona Workers Act.

211. The Legal Arizona Workers Act places Arizona employers, including plaintiffs and their members, at risk of being found to be in violation of Arizona law because Arizona employers followed and complied with the information from the federal government that their use of E-Verify is voluntary, as communicated to them by the federal government on the computer system maintained by the federal government and that is made mandatory by the Legal Arizona Workers Act.

212. It is preempted by the federal law, unconstitutional, and a denial of due process for the State of Arizona and Defendants to place Arizona employers in the position of disregarding, ignoring, or not following the information and directions given to them by the federal government on the very computer system that the State of Arizona requires Arizona employers to use in order to participate in E-Verify.

213. The federal government's Memorandum of Understanding provides that the federal government may revoke the right of any employer to use E-Verify if they do not comply with all of the federal government's requirements for use of the program.

214. Studies by the federal government document that at least half of the users of E-Verify violate the federal government's requirements in the manner in which they use the program.

215. The Memorandum of Understanding that is a contract between employers and the federal government for use of E-Verify obligates the federal government to furnish to the employer the name, address and telephone number of a federal government employee who will available [sic] to answer the employer's questions and provide support for the employer's use of E-Verify.

216. The State of Arizona does not have the authority to require employers to use E-Verify, and its attempt to do so in the Legal Arizona Workers Act is preempted by federal law.

217. The Legal Arizona Workers Act will place burdens on the Executive Branch of the federal government including the Department of Justice, Department of Homeland Security, and Social Security Administration, that will impede the functions of those agencies.

218. By requiring that every complaint be investigated and that every investigation must involve querying the federal government under 8 U.S.C. § 1373(c), the Legal Arizona Workers Act places an impermissible burden on the federal government.

219. By requiring that every Arizona employer use E-Verify, the Legal Arizona Workers Act places an impermissible burden on the Executive Branch of the federal government, including the Social Security Administration and the Department of Homeland Security, who currently do not have the resources to successfully absorb, support, monitor and enforce the compliance of 139,500 new Arizona users of E-Verify, which currently has approximately 17,000 companies enrolled and only half that many that actively use the program.

220. The Legal Arizona Workers Act is preempted by the Constitution and federal law because it places some Arizona employers, including some of the Plaintiffs and some of their members in the position of being compelled to violate the laws of the State of Illinois.

221. The State of Illinois has enacted Public Act 095-0138, that states, in part, "employers are prohibited from enrolling in any employment eligibility verification system, including E-Verify, as authorized by 8 U.S.C. § 1324(a) ... until the Social Security Administration (SSA) and Department of Homeland Security (DHS) databases are able to make a determination on 99% of the tentative non-confirmation notices issued to employers within three days, unless otherwise required by federal law."

222. The Social Security Administration and Department of Homeland Security databases do not meet the performance standards mandated by the State of Illinois, as set forth above.

223. Arizona employers who also have employees in Illinois are therefore prohibited by the State of Illinois from using E-Verify, but are compelled by the

State of Arizona to use E-Verify under the Legal Arizona Workers Act effective on January 1, 2008.

224. The Legal Arizona Workers Act violates the Supremacy Clause of the Constitution, is preempted by federal law, and violates due process rights. It places some Arizona employers, including some of the Plaintiffs and their members, in the position of mandating under Arizona law that they violate the laws of the State of Illinois.

225. E-Verify is intended to be and has been adopted and implemented by the federal government as a program for which enrollment by participating employers is voluntary.

226. The obligations imposed upon employers pursuant to the terms of E-Verify Memorandum of Understanding include the employer's consent to certain rights of the federal government to inspect the employer's property and documents.

227. As set forth in the Sixth Claim for Relief, under the Fourth Amendment to the U.S. Constitution, the federal government would not possess the right to conduct searches without a warrant of the property and documents of employers who participate in E-Verify without the consent of employers to allow such searches without a warrant.

228. E-Verify's requirement that participating employers consent to the right of the federal government to conduct searches of the property and documents of employers who participate in E-Verify requires that the participation of employers in E-Verify must be voluntary on the part of the employers.

229. If employers are compelled to participate in E-Verify, they will not have consented to the rights of the federal government to conduct searches of the employers' property and documents.

230. The Legal Arizona workers Act compels Arizona employers, including Plaintiffs and their members, to participate in the otherwise voluntary E-Verify systems.

231. By compelling participation in E-Verify, the Legal Arizona Workers Act is inconsistent with and negates the voluntariness of E-Verify that is essential for there to be consent to the federal government's right to inspect the participating employers' property and documents without a warrant.

232. E-Verify is preempted by federal law and violates the Supremacy Clause of the U.S. Constitution by interfering with, contradicting, and negating the voluntariness of the participating in E-Verify that is essential for the participants in the program having given consent to the federal government's rights under the Memorandum of Understanding to conduct searches of the employers' property and documents without a warrant.

233. The requirement in A.R.S. § 32-1154(12) that would deprive Plaintiffs or their members of a contractor's license as a result of their failure to comply with the Legal Arizona Workers Act, including the mandate to enroll in the E-Verify Program, is preempted and conflicts with federal law and imposes a burden on some of the members of Plaintiff associations.

234. Plaintiffs are entitled to a declaratory judgment that the Legal Arizona Workers Act is unconstitutional because it is preempted by federal law.

235. Plaintiffs are entitled to a preliminary and permanent injunction to enjoin the County Attorneys and Attorney General from taking actions to enforce or implement the Legal Arizona Workers Act.

236. Plaintiffs are entitled to a preliminary and permanent injunction to enjoin Fidelis V. Garcia from taking any action against any Plaintiff or member of Plaintiff associations on the basis that such Plaintiff or Plaintiff member failed to comply with the Legal Arizona Workers Act.

FIFTH CLAIM FOR RELIEF

VIOLATION OF THE SEPARATION OF POWERS DOCTRINE OF THE ARIZONA CONSTITUTION.

237. Plaintiffs hereby incorporate by this reference all allegations of the preceding paragraphs of this Complaint, as if fully set forth herein.

238. The Constitution of Arizona divides the State Government of Arizona into three branches, the executive, legislative and judicial. Article III of the Constitution states as follows:

> The powers of the government of the State of Arizona shall be divided into three separate departments, the Legislative, the Executive, and the Judicial, and, except as provided in this Constitution, such departments shall be separate and distinct, and no one of such departments shall exercise the powers properly belonging to either of the others.

239. The Arizona Constitution prohibits each branch of government from exercising the powers that are given by the Constitution to a separate branch of government.

240. The Constitution of Arizona prohibits the Legislative Branch of government from exercising executive powers that properly belong to the Executive Branch of government.

241. The Legislative Branch has the power to write and pass laws. The Executive Branch has the sole power to carry out the provisions of the law.

242. The Legal Arizona Workers Act contains a legislative mandate that the Executive Branch of government investigate every complaint that it receives alleging that an employer is knowingly or intentionally employing an unauthorized alien. A.R.S. § 23-212(A).

243. A.R.S. § 23-212(B) dictates the method by which the Executive Branch of government shall investigate each complaint. A.R.S. § 23-212(B) mandates that the investigation regarding an employee's status shall consist solely of an inquiry to the federal government pursuant to 8 U.S.C. § 1373(c).

244. A.R.S. § 23-212(B) prohibits the Executive Branch of government from considering information other than a response from the federal government pursuant to 8 U.S.C. § 1373(c) in acting upon each complaint received by the Executive Branch and determining whether an alien is authorized to work in the United States.

245. The Legal Arizona Workers Act mandates that the Executive Branch of government prosecute each complaint that is "not frivolous."

246. The Legal Arizona Workers Act does not allow the exercise of discretion by the Executive Branch in enforcing the Act. Prosecutors will be required to bring lawsuits that on balance lack merit but do not fall to the level of being "frivolous."

247. The Legal Arizona Workers Act mandates that the Executive Branch take each of the above actions regardless of the resources, other duties, professional judgment and other priorities or factors that the Executive Branch would otherwise consider in discharging its duties under the Legal Arizona Workers Act and under all other laws for which it has the responsibility to take action.

248. Because of the mandate of the Legal Arizona Workers Act that all complaints under A.R.S. § 23-212(B) must be investigated and all non frivolous complaints under the Legal Arizona Workers Act must be prosecuted, it is possible that the Executive Branch of the Arizona Government may be unable to discharge other important duties that are the responsibility of the Executive Branch, including but not limited to prosecuting suspects for murder, rape, child molestation, hate crimes, financial fraud, driving while intoxicated, and other crimes.

249. The above provisions of the Legal Arizona Workers Act violate the separation of powers clause of the Arizona Constitution. Each of the provisions set forth above constitutes the exercise by the Legislative Branch of powers that are reserved to the Executive Branch.

250. Plaintiffs are entitled to a declaratory judgment that the Legal Arizona Workers Act is unconstitutional because it violates the separation of powers of the Arizona Constitution.

251. Plaintiffs are entitled to a preliminary and permanent injunction to enjoin the County Attorneys and Attorney General from taking actions to enforce or implement the Legal Arizona Workers Act.

SIXTH CLAIM FOR RELIEF

VIOLATION OF PROTECTION AGAINST UNREASONABLE SEARCHES AND SEIZURES UNDER THE U.S. CONSTITUTION

252. Plaintiffs hereby incorporate by reference all allegations of the preceding paragraphs of this Complaint, as fully set forth herein.

253. Pursuant to the Fourth and Fourteenth Amendments of the U.S. Constitution, state and local governments are prohibited from conducting unreasonable searches and seizures. The Fourth Amendment provides:

> The right of people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be search, [sic] and the person or things to be seized.

254. The Legal Arizona Workers Act mandates that after December 31, 2007, every employer must verify the employment eligibility of employees through the federal government's otherwise voluntary E-Verify.

255. Every employer that participates in the E-Verify must sign a Memorandum of Understanding that states responsibilities and obligations of the employer. Article II, Section C(15) of the Memorandum of Understanding requires employers to allow the Department of Homeland Security, or authorized agents to make periodic visits to the employers, to review E-Verify-related records, to interview

employees of the employer, and to inspect other employment records.

256. An employer's enrollment in E-Verify subjects the employer to greater rights by the federal government to inspect records and obtain access to an employer's property than would otherwise exist without a warrant.

257. The Legal Arizona Workers Act, by compelling Plaintiffs and their members to enroll and participate in E-Verify, constitutes a forced waiver of Fourth Amendment rights to be free from unreasonable searches and seizures. Mandating participation in E-Verify and mandating signing the Memorandum of Understanding is not a proper consent to search or waiver of employers' Fourth Amendment protections. Rather, it effectively forces employers to waive their constitutionally guaranteed protections against warrantless searches.

258. Plaintiffs are entitled to a declaratory judgment that the Legal Arizona Workers Act is unconstitutional because it violates the Fourth Amendment of the U.S. Constitution.

259. Plaintiffs are entitled to a preliminary and permanent injunction to enjoin the County Attorneys and Attorney General from taking actions to enforce or implement HB 2779.

DEMAND FOR RELIEF

WHEREFORE, Plaintiffs respectfully demand judgment awarding the following:

A. A declaratory judgment pursuant to 28 U.S.C. §§ 2201 and 2202 declaring that the Legal Arizona Workers Act is unconstitutional because it violates the procedural

due process guarantees of the Fourteenth Amendment to the U.S. Constitution.

B. A declaratory judgment pursuant to 28 U.S.C. §§ 2201 and 2202 declaring that the Legal Arizona Workers Act is unconstitutional because it violates the procedural due process guarantee of Article II § 4 of the Arizona Constitution.

C. A declaratory judgment pursuant to 28 U.S.C. §§ 2201 and 2202 declaring that the Legal Arizona Workers Act is unconstitutional because it is preempted by federal law.

D. A declaratory judgment pursuant to 28 U.S.C. §§ 2201 and 2202 declaring that the Legal Arizona Workers Act is unconstitutional because it violates the Commerce Clause of the U.S. Constitution.

E. A declaratory judgment pursuant to 28 U.S.C. §§ 2201 and 2202 declaring that the Legal Arizona Workers Act is unconstitutional because it violates the separation of powers of the Arizona Constitution.

F. A declaratory judgment pursuant to 28 U.S.C. §§ 2201 and 2202 declaring that the Legal Arizona Workers Act is unconstitutional because it violates the Fourth Amendment to the U.S. Constitution.

G. A preliminary and permanent injunction to enjoin the County Attorneys, Attorney General and Fidelis V. Garcia from taking actions to enforce or implement the Legal Arizona Workers Act.

H. An award of attorneys' fees and costs, plus interest, pursuant to 42 U.S.C. § 1988.

I. Such other relief as the Court deems just and proper.

RESPECTFULLY SUBMITTED this 9th day of December, 2007.

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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA
PHOENIX DIVISION

Case No. __

VALLE DEL SOL, INC.; CHICANOS POR LA CAUSA, INC.; and SOMOS AMERICA,
Plaintiffs,

vs.

TERRY GODDARD, in his official capacity as Attorney General of the State of Arizona; GALE GARRIOTT, in his official capacity as the Director of the Arizona Department of Revenue; and ANDREW THOMAS, in his official capacity as Maricopa County Attorney,
Defendants.

COMPLAINT

INTRODUCTION

1. This lawsuit challenges Arizona's attempt to enact laws regulating immigration that intrude on the federal government's plenary power and provide less protection to workers and employers than federal laws.

2. The recently-enacted Legal Arizona Workers Act (the "Act"), establishes a system unique to Arizona for sanctioning employers that employ aliens who are not authorized to work. The Act also requires employers to verify the employment eligibility of each employee through a federal verification program known as "E-Verify," even though federal law estab-

lishes that participation in that program is voluntary. The Act is attached as Exhibit A.

3. The Act violates the Supremacy Clause of the United States Constitution because it is preempted by federal immigration law and the federal government's exclusive authority to regulate immigration. The Act also violates the Fourteenth Amendment to the U.S. Constitution because it deprives employers and workers of liberty and property without due process of law.

4. Were the Act's provisions regarding employment of unauthorized aliens and verification of employment eligibility to be upheld, it would be license for every state and, indeed, every locality to enact its own immigration laws. The result would be inconsistency and extreme confusion. This lawsuit seeks to avoid that result.

5. This lawsuit also seeks to prevent the inevitable harm to workers who are authorized to work in the United States, particularly foreign-born workers and national origin minorities, that the Act will cause if it is allowed to take effect. The Act will cause authorized workers to not be hired, to be terminated, to have to undertake additional state-created efforts to demonstrate that they are authorized to work, or to suffer other harms. Finally, the suit seeks to prevent harm to employers who must comply with the Act.

JURISDICTION AND VENUE

6. This Court has jurisdiction under 28 U.S.C. §§1331 and 1343 because Plaintiffs assert claims under the Constitution of the United States and 42 U.S.C. §1983.

7. Venue is proper in this judicial district under 28 U. S.C. §1391(b).

PARTIES

8. Plaintiff Valle del Sol, Inc., is an Arizona non-profit corporation located in Phoenix, Maricopa County, Arizona. Founded in 1970, Valle del Sol's mission is to empower the Latino community through advocacy and a continuum of culturally sensitive health services, partnerships, and social services. Valle del Sol's programs include substance abuse prevention and treatment and a wide range of support services for youth and families, such as counseling, parenting classes, a family resource center, a leadership institute, and health education. Valle del Sol employs approximately 175 persons in Arizona and regularly contracts with independent contractors. Valle del Sol is licensed by the State of Arizona. Valle del Sol believes the Act will harm workers that are authorized to work in the United States and their families. In particular, Valle del Sol brings this challenge out of concern that workers, particularly foreign-born workers and national origin minorities, will not be hired in the first place, will lose their jobs, will have to undertake additional efforts to demonstrate that they are authorized to work, or will otherwise be harmed because of the Act. Valle del Sol in turn may need to respond by diverting resources from its present programs to assist people who are denied employment or terminated. Complying with the employer sanctions and verification provisions of the Act will also harm Valle del Sol. Valle del Sol currently complies with federal legal requirements for verifying employment, but does not use the voluntary E-Verify program as a means of verifying employment eligibility of its employees. If the Act takes effect,

Valle del Sol will be forced to use the voluntary E-Verify system to verify employment eligibility. Not only does the Act require employers to use E-Verify (Ariz. Rev. Stat. §23-214), but it also provides a rebuttable presumption against liability for intentionally or knowingly employing an unauthorized alien (Ariz. Rev. Stat. §23-212(I)) and allows for enhanced penalties if E-Verify is not used (Ariz. Rev. Stat. §23-212(F)(1)(d)(ii), (iv), (2)(c)(ii), (iv)). Valle del Sol fears that if it does not use E-Verify and a new employee turns out to be unauthorized, Valle del Sol may not have as strong a defense under the Act and may be subject to harsh penalties. Using E-Verify would impose added costs and obligations on Valle del Sol, including learning how to use E-Verify; registering for E-Verify, which includes signing a Memorandum of Understanding with the Department of Homeland Security ("DHS") and Social Security Administration ("SSA") that in turn requires employers to complete a tutorial and become familiar with and comply with a lengthy manual; and submitting data to E-Verify for all new hires such as name, date of birth, and social security number. If the Act does not take effect, Valle del Sol will not use E-Verify and will not incur the attendant costs and obligations.

9. Plaintiff Chicanos Por La Causa, Inc. ("CPLC") was formed in 1969 by concerned Hispanic citizens to address social issues in their community. Today, CPLC is one of Arizona's largest non-profit, community-based organizations, as well as one of the largest community development corporations in the nation. CPLC is licensed by the State of Arizona and is headquartered in Phoenix. CPLC is committed to building stronger, healthier communities as a lead advocate, coalition builder, and direct service provider. CPLC employs more than 600 people in Arizona and

regularly contracts with independent contractors. CPLC has programs in education, including the Migrant Head Start Program, charter schools, prevention programs, and school enrichment programs. CPLC also has programs in housing, including property management; client counseling; and single, multi-family, senior, and self-help housing. CPLC's economic development programs include business lending, commercial development, and employment and training. CPLC runs social services programs, including behavioral health, emergency assistance, domestic violence, elderly, immigration, HIV, health, and legal information and referral services. CPLC subsidiaries include a facility management company, federal credit union, mortgage company, women's care center, construction company, day labor center, and property/real estate purchasing and management company. CPLC challenges the Act because of the harm it will cause to workers that are authorized to work in the United States and to their families. CPLC is concerned that workers, particularly foreign-born workers and national origin minorities, will not be hired in the first place, will lose their jobs, will have to undertake additional efforts to demonstrate that they are authorized to work, or will otherwise be harmed because of the Act. CPLC in turn may need to divert resources from its ongoing programs to assist persons who are denied employment or terminated. Complying with the employer sanctions and verification provisions of the Act will also harm CPLC. Currently, CPLC complies with federal legal requirements, but does not use the voluntary E-Verify system as a means of verifying employment eligibility of its employees. If the Act takes effect, CPLC will use the voluntary E-Verify program to verify employment eligibility both because the Act

requires employers to do so (Ariz. Rev. Stat. §23-214) and, separately, because doing so provides a rebuttable presumption against liability for intentionally or knowingly employing an unauthorized alien (Ariz. Rev. Stat. §23-212(I)). Using E-Verify would impose added costs and obligations on CPLC, including learning how to use the program; registering for E-Verify, which includes signing a Memorandum of Understanding; and submitting to E-Verify for all new hires information such as name, date of birth, and social security number.

10. Plaintiff Somos America is a community based coalition of grassroots organizations, community and religious leaders, labor unions, and students established in March 2006 to mobilize for social justice and equal rights for immigrant communities in Arizona and for comprehensive immigration reform. Somos America seeks to challenge injustice and the exploitation of workers and to promote civic participation, political awareness, and education within the Latino community.

11. Defendant Terry Goddard is sued in his official capacity as the Attorney General of the State of Arizona. The Attorney General is in charge of and directs the department of law and is Arizona's chief legal officer. Ariz. Rev. Stat. §41-192(A). The department of law supervises the county attorneys. Ariz. Rev. Stat. §41-193(A)(4). The department of law also shall, ["a]t the direction of the governor, or when deemed necessary, assist the county attorney of any county in the discharge of the county attorney's duties." Ariz. Rev. Stat. §41-193(A)(5). The Act appropriates $100,000 in fiscal year 2007-2008 to the Attorney General for enforcing the Act. An injunction in this lawsuit would prevent the Attorney General

from using this and any future appropriations to enforce the Act, and the Attorney General would no longer be able to exercise his authority under and with respect to the Act.

12. Defendant Gale Garriott is sued in his official capacity as the Director of the Arizona Department of Revenue. Section 3 of the Act requires the Department of Revenue to provide notice of the Act to every employer on or before October 1, 2007. The Director has complied with Section 3. The notice is attached as Exhibit B. An injunction in this case would require the Director to rescind this notice.

13. Defendant Andrew Thomas is the County Attorney for Maricopa County, Arizona. The County Attorney intends to enforce the Act. A news release from the County Attorney is attached as Exhibit C.

GENERAL BACKGROUND

14. Governor Janet Napolitano signed the Legal Arizona Workers Act, House Bill 2779, into law on July 2, 2007. Section 2 of the Act institutes sanctions against employers that intentionally or knowingly employ an unauthorized alien and requires employers to use the federal "Basic Pilot Program"—since renamed "E-Verify"—to verify employment eligibility of their employees.

Prohibition on Intentionally or Knowingly Employing an Unauthorized Alien

15. Section 23-212 prohibits employers from intentionally or knowingly employing an unauthorized alien. Ariz. Rev. Stat. §23-212(A). An "unauthorized alien" is defined as an alien who does not have the legal right to work in the United States under federal law. Ariz. Rev. Stat. §23-211(8). An "employer" is

defined as any individual or organization that transacts business in Arizona, has a license issued by an Arizona agency, and employs at least one person who performs employment services in Arizona. Ariz. Rev. Stat. §23-211(4). A "license" is broadly defined to include "any agency permit, certificate, approval, registration, charter or similar form of authorization that is required by law" and that is issued by any state or local agency for the purposes of operating a business in Arizona, and includes articles of incorporation and partnership registrations. Ariz. Rev. Stat. §23-211(1), (7).

16. On receipt of a complaint that an employer is violating the prohibition on employing an unauthorized alien, the Arizona Attorney General or county attorney must investigate the complaint by verifying the work authorization of the alleged unauthorized alien with the federal government, according to the federal inquiry procedure set forth in 8 U.S.C. §1373(c). Ariz. Rev. Stat. §23-212(B).

17. 8 U.S.C. §1373(c) provides: "The Immigration and Naturalization Service shall respond to an inquiry by a Federal, State, or local government agency, seeking to verify or ascertain the *citizenship or immigration status* of any individual within the jurisdiction of the agency for any purpose authorized by law, by providing the requested verification or status information." (Emphasis added.)

18. Employment authorization status is distinct from citizenship or immigration status under federal law. For instance, some persons who lack lawful immigration status may nonetheless be authorized to work by the federal government.

19. If upon completion of the federal inquiry regarding citizenship or immigration status the Arizona Attorney General or county attorney determines that the complaint that an employer is employing an unauthorized alien was not frivolous, then he or she must notify United States Immigration and Customs Enforcement and the local law enforcement agency of the presence of the allegedly unauthorized alien. Ariz. Rev. Stat. §23-212(C)(1), (2). For all non-frivolous complaints to the Attorney General, the Act requires the Attorney General to "notify the appropriate county attorney to bring an action pursuant to Subsection D." Ariz. Rev. Stat. §23-212(C)(3).

20. Subsection D provides that the county attorney bring an action against an employer who intentionally or knowingly employs an unauthorized alien in the county where the unauthorized alien is employed. Ariz. Rev. Stat. §23-212(D). In determining whether an employee is unauthorized to work, the Superior Court may *only* consider the federal government's "determination" under 8 U.S.C. §1373(c), even though that "determination" is deemed to create a "*rebuttable* presumption of the employee's lawful status." Ariz. Rev. Stat. §23-212(H) (emphasis added).

21. An employer that has verified its employee's employment authorization through a voluntary federal verification program known as E-Verify is entitled to a rebuttable presumption that the employer did not intentionally or knowingly employ an unauthorized alien. Ariz. Rev. Stat. §23 -212(I). E-Verify is a voluntary program the federal government has offered employers.

22. The Act authorizes several state-created employer sanctions for an employer found to have intentionally or knowingly employed unauthorized

aliens under the Act. First, the employer must terminate the employment of all unauthorized aliens and file a sworn affidavit stating that it has done so and that it will not intentionally or knowingly employ any unauthorized aliens. Ariz. Rev. Stat. §23-212(F)(1)(a), (1)(c), (2)(a), (2)(d). Second, the employer is placed on probation for the first violation—for three years for a knowing violation and five years for an intentional violation—during which time the employer must file quarterly reports of each new employee it has hired at the location where the unauthorized alien performed work. Ariz. Rev. Stat. §23-212(F)(1)(b), (2)(b). Third, all of the employer's licenses may be suspended for a knowing violation; must be suspended for an intentional violation; and, upon a second violation of any type during the probation period, must be permanently revoked. Ariz. Rev. Stat. §23-212 (F)(1)(d), (2)(c), (3). Finally, all court orders with respect to violations will be posted on the Attorney General's website to publicize employer violations. Ariz. Rev. Stat. §23-212(G).

Mandated Verification of Work Status Through E-Verify

23. The Legal Arizona Workers Act also requires employers, after hiring any employee, to "verify the employment eligibility of the employee through the Basic Pilot Program." Ariz. Rev. Stat. §23-214.

24. The Basic Pilot Program, now known as "E-Verify," refers to a *voluntary* and *experimental* program established by Congress in the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 ("IIRIRA"), Pub. L. No. 104-208 (Sept. 30, 1996), along with two other employment verification pilot programs which have since been suspended. E-Verify is set to expire in November 2008 under the

Basic Pilot Program Extension and Expansion Act of 2003, Pub. L. No. 108-156 (Dec. 3, 2003). 8 U.S.C. §1324a note; 69 Fed. Reg. 75997, 75998 (Dec. 20, 2004). E-Verify permits employers who choose to participate to verify electronically workers' employment eligibility. (Pursuant to statute, a few employers that have violated federal employment verification laws may be required to use E-Verify by the federal government.)

25. E-Verify started in 1997 in only five states, and has been available nationwide since December 2004. Employers who use E-Verify must engage in various activities, including learning how to use the program; registering for E-Verify, which includes signing a Memorandum of Understanding ("MOU") with DHS and SSA; and submitting to E-Verify for all new hires data such as employee name, date of birth, and social security number. In addition to initial training, employers must periodically update and re-train the persons using E-Verify each time the system is updated or changed.

26. The MOU imposes requirements on employers, including the following: All employer representatives who use E-Verify must complete a tutorial; the employer must become familiar with and comply with the E-Verify manual (which is 64 pages); the employer must agree that in verifying employment eligibility of an employee at the time of hire via the federal Form I-9 process, the employer will only accept documents to establish identity that contain a photograph even though other employers are not so limited under federal law pursuant to 8 C.F.R. §274a.2(b)(1)(v)(B); and the employer must agree not to use E-Verify as a pre-employment screening procedure or to engage in any unlawful employment practice. The MOU also

provides that the federal government may terminate access to E-Verify with 30 days' notice.

27. E-Verify compares data submitted by employers via the Internet to information in federal SSA and DHS databases. The system first uses the SSA database to verify an employee's name, date of birth, and social security number. Upon such verification, if the employee claimed U.S. citizenship and such citizenship is confirmed by SSA's database, E-Verify confirms employment eligibility. For non-U.S. citizens, E-Verify uses the DHS database and sometimes DHS personnel to check whether the employee is authorized to work. If the SSA database is unable to verify the employee information or DHS is unable to verify employment authorization, E-Verify issues a tentative nonconfirmation. An employee may contest a tentative nonconfirmation by contacting the federal government to resolve inaccuracies in the records. If an employee does not contest the tentative nonconfirmation within eight federal working days, it becomes final and employers must terminate the employee or notify DHS that the employer is not terminating the employee.

28. E-Verify has encountered a number of problems with accuracy and capacity since its inception. As the United States Citizenship and Immigration Services found in its 2004 report mandated by Congress, the problems include "unacceptably high" tentative nonconfirmation rates for foreign-born work-authorized employees and "higher than desirable" rates for U.S.-born employees; lack of employer compliance with the program's requirements, which reduces E-Verify's effectiveness and contributes to discrimination against foreign-born employees; and unattractiveness of the program to employers. In 2006, the SSA Inspector

General found that the SSA database contained enough discrepancies to result in an incorrect finding in four percent of E-Verify submissions. Moreover, the records for supposedly non-U.S. citizens showed seven percent were actually U.S. citizens who had not updated their citizenship status. As of May 2007, approximately 17,000 employers nationwide had registered for E-Verify, of which fewer than 9,000 were active users. The Act will add 130,000-150,000 businesses to E-Verify, and the State of Arizona believes that this "could strain the system." Letter from Governor Janet Napolitano to Speaker Nancy Pelosi and Majority Leader Harry Reid, July 2, 2007, attached as Exhibit D.

Effective Date and Harm

29. Both the prohibition on intentionally or knowingly employing an unauthorized alien and the verification requirement in Section 2 of the Act become effective on January 1, 2008. Ariz. Rev. Stat. §§23-212(D), §23-214. Under Section 3 of the Act, the Department of Revenue provided notice of Section 2 of the Act to every employer on or before October 1, 2007.

30. The Act will have at least the following adverse effects: (a) cause workers who are eligible for employment, particularly foreign-born workers and national origin minorities, not to be hired in the first place, to lose their jobs, and to have to undertake additional, state-created efforts to demonstrate that they are authorized to work; and (b) impose additional costs and obligations on employers not required by federal law.

FIRST CLAIM FOR RELIEF

(Article VI, Section 2, of the United States Constitution; 42 U.S.C. §1983)

31. Plaintiffs re-allege and incorporate by reference ¶¶1 through 30.

32. Article VI, Section 2, of the United States Constitution, known as the Supremacy Clause, provides: "This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution of Laws of any State to the Contrary notwithstanding."

33. The Supremacy Clause mandates that federal law preempts any state regulation of any area over which Congress has expressly or impliedly exercised exclusive authority or which is constitutionally reserved to the federal government.

34. The power to regulate immigration is an exclusively federal power that is inherent in the nation's sovereignty and derives from the Constitution's grant to the federal government of the power to "establish a uniform Rule of Naturalization," U.S. Const. art. I, §8, cl. 4., and to "regulate Commerce with foreign Nations," *id.*, cl. 3.

35. Pursuant to its exclusive power over matters of immigration, the federal government has established a comprehensive system of laws, regulations, procedures, and administrative agencies that determine, subject to judicial review, whether and under what conditions a person may enter and live in the United States, including the Immigration and Nationality

Act ("INA"), 8 U.S.C. §1101, *et seq*. In 1986, for the first time, Congress prohibited employers from knowingly hiring unauthorized aliens and established a detailed employment verification process with sanctions for employing unauthorized aliens. Immigration Reform and Control Act of 1986 ("IRCA"), 8 U.S.C. §§1324a-1324b. The process of verifying employment eligibility of an employee at the time of hire is known as the federal Form I-9 process.

36. The INA as amended by IRCA sets forth a comprehensive employer sanctions scheme that includes safeguards such as an affirmative defense for employers who comply with the Form I-9 process in good faith; restrictions on reverification of employees after they are hired; extensive antidiscrimination provisions; prohibitions on employers requesting additional documents once an employee presents minimally adequate documentation; a 10-day cure period for good-faith violations; and a graduated series of penalties.

37. Before finding an employer in violation, federal immigration law requires notice, an opportunity for a hearing with witnesses and evidence before a federal administrative law judge, a finding that a violation has occurred based on a preponderance of the evidence, a chance for an administrative appeal, and an opportunity for review in the appropriate United States Court of Appeals. 8 U. S.C. §1324a(e)(2)-(3), (7)-(8).

38. The comprehensive federal employer sanctions scheme does not require that employers verify the immigration status of certain categories of workers, such as independent contractors and casual domestic workers. 8 C.F.R. §274a. 1(f), (h), (j).

39. The documents used in the federal verification process "may not be used for purposes other than for enforcement of this chapter [IRCA] and sections [of Title 18 of the U.S. Code]." 8 U.S.C. §1324a(b)(5).

40. Under the Supremacy Clause, the federal government has the authority to enforce immigration statutes and regulations, confer benefits, make discretionary determinations, undertake adjudication, and otherwise administer the federal immigration laws.

41. The federal government retains and exercises the power to investigate employment of unauthorized aliens at workplaces and has publicly raided workplaces allegedly employing undocumented aliens.

42. The laws, procedures, and policies created by the federal government confer rights in a careful balance reflecting the national interest. The Legal Arizona Workers Act's prohibition on employers intentionally or knowingly employing an unauthorized alien and requirement that employers verify employment eligibility threaten that balance and are preempted.

43. IRCA provides for express preemption as follows: "The provisions of this section preempt any State or local law imposing civil or criminal sanctions (other than through licensing and similar laws) upon those who employ, or recruit or refer for a fee for employment, unauthorized aliens." 8 U.S.C. §1324a (h)(2).

44. The Act is expressly preempted under IRCA's preemption provision because it is not a licensing law. Rather, the Act is an employment law that includes licensing sanctions. The Act's title makes no reference to licensing; the Act is codified separately

from any licensing provisions; the Act encompasses legal instruments that neither the State nor common sense would consider "licenses" in the usual context; the Act imposes sanctions beyond even the "licenses" as defined in the Act; and the goal of the Act is to set forth a general prohibition on the employment of unauthorized workers, not to impose particular conditions as part of specific licensing procedures.

45. Under IRCA's preemption provision, licensing penalties are permitted *only* when the federal government has found an employer to have violated IRCA. The Legal Arizona Workers Act purports to allow licensing penalties for employers that intentionally or knowingly employ an unauthorized alien even if the federal government has not found those employers to have violated IRCA, and is therefore expressly preempted.

46. The Act's institution of licensing penalties for employers that intentionally or knowingly employ an unauthorized alien and the requirement that employers verify employment are impliedly preempted because they:

a. Amount to an attempt to regulate immigration and its incidents.

b. Operate in a field occupied by the federal government through Congress' actions with respect to prohibiting the employment of unauthorized workers and verifying employment eligibility.

c. Stand as an obstacle to federal law by posing a number of actual obstacles to the objectives of Congress, including:

i. The Act will burden federal resources because the Arizona Attorney General or county attorney

must investigate *every complaint* about unauthorized aliens through the federal inquiry procedure under 8 U.S.C. §1373(c). Ariz. Rev. Stat. §23-212(B). Under IRCA, only complaints "which, on their face, have a substantial probability of validity" or other violations "as the [U.S.] Attorney General determines to be appropriate," are investigated. 8 U.S.C. §1324a(e)(1).

ii. The Act's unauthorized alien provisions disrupt and override the carefully balanced system that Congress designed to guarantee due process, protect employees against discrimination, and minimize disruption to businesses. 8 U.S.C. §§1324a-1324b.

iii. The Act covers independent contractors and casual domestic workers. Ariz. Rev. Stat. §23-211(3). Federal law does not. 8 C.F.R. §274a.1(f), (h), (j).

iv. IRCA contains an affirmative defense for employers who comply in good faith with the Form I-9 process. 8 U.S.C. §1324a(a)(3). The Arizona Act purports to provide a similar affirmative defense. Ariz. Rev. Stat. §23-212(J). But IRCA precludes use of the Form I-9 documents for this purpose. 8 U.S.C. §1324a(b)(5).

v. The Act's mandatory verification requirement contravenes Congress' manifest intent to establish a *voluntary* and *temporary* E-Verify program.

vi. The Act's mandatory verification requirement also threatens to strain the federal system by using E-Verify in an unanticipated manner. As demonstrated by Exhibit D, the law will add 130,000 to 150,000 new businesses to the experimental program, and even Governor Napolitano has cast doubt on the ability of the federal system to handle the volume of usage resulting from the Arizona law.

47. For the above and other reasons, the effect of the Act is to upset the system established by Congress by implementing Arizona's own enforcement mechanism, penalties, and interpretations in place of the federal system, detracting from and impeding the integrated scheme of regulation Congress created.

48. The Legal Arizona Workers Act's prohibition on employers intentionally or knowingly employing an unauthorized alien and requirement that employers verify employment eligibility violate the Supremacy Clause.

SECOND CLAIM FOR RELIEF

(Fourteenth Amendment to the United States Constitution; 42 U. S.C. §1983)

49. Plaintiffs re-allege and incorporate by reference ¶¶1 through 48.

50. The Due Process Clause of the Fourteenth Amendment to the United States Constitution guarantees certain fundamental rights, including the right to a meaningful hearing prior to the deprivation of liberty or property.

51. The right to work is a liberty and property interest protected by the Fourteenth Amendment.

52. The right to a business license is a property interest protected by the Fourteenth Amendment.

53. Under federal immigration law, a violation for employing an unauthorized alien is found only after a number of steps culminating in an administrative law judge with expertise in immigration matters determining, "upon the preponderance of the evidence received," including any witnesses and production of evidence, that the violation had occurred. 8 U.S.C. § 1324a(e)(2), (3). An employer can appeal this

order administratively and seek judicial review in federal court. 8 U. S.C. § 1324a(e)(7)-(8).

54. The investigation and court procedures contemplated by the Legal Arizona Workers Act do not provide employers or employees with the opportunity to be heard regarding the work status of an employee and the license of an employer in a meaningful manner. An employee's work status is determined through a mere inquiry procedure to the federal government about citizenship or immigration status, which is the only matter an Arizona Superior Court may consider in deciding whether an employee is authorized or not. Ariz. Rev. Stat. §23-212(H). The inquiry procedure under 8 U. S.C. § 1 373(c) does not provide the protections set forth in the preceding paragraph or other protections afforded by federal law.

55. The insufficient process afforded under the Legal Arizona Workers Act means that employers who may not be found to have violated IRCA could be found liable under the Act.

56. Any purported process provided by the Act relating to the determination of immigration status is illusory because state courts lack the authority to determine such status.

57. The Act's provisions on employing an unauthorized alien violate Due Process rights.

PRAYER FOR RELIEF

WHEREFORE, Plaintiffs pray for the following relief:

A. A temporary and permanent injunction enjoining Defendants, their officials, agents, employees, assigns, and all persons acting in concert or partici-

pating with them from implementing or enforcing Section 2 of the Legal Arizona Workers Act;

B. A permanent injunction enjoining Defendants, their officials, agents, employees, assigns, and all persons acting in concert or participating with them from failing to notify employers that the Act is no longer valid and the notice sent under Section 3 of the Legal Act should be disregarded;

C. A declaration pursuant to 28 U.S.C. §§2201 and 2202 that Sections 2 and 3 of the Legal Arizona Workers Act are unlawful and invalid;

D. Reasonable attorneys' fees and expenses pursuant to 42 U.S.C. §1988;

E. Costs of suit; and

F. Such other and further relief as the Court deems equitable, just, and proper.

Dated: December 12, 2007

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By /s/ Kristina M. Campbell
Kristina M. Campbell

Attorneys for Plaintiffs

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

Case No. CV-07-2496-PHX-NVW (Lead)
Case No. CV-07-2518-PHX-NVW (Member)
(Consolidated)

ARIZONA CONTRACTORS ASSOCIATION, INC., et al.,
Plaintiffs,

v.

CRISS CANDELARIA, et al.,
Defendants.

VALLE DEL SOL, INC., ET AL.,
Plaintiffs,

v.

TERRY GODDARD, ET AL.,
Defendants.

JOINT STATEMENT OF
STIPULATED FACTS

Pursuant to the Court's Order and the Stipulation of the parties, the parties hereby submit the following Joint Statement of Facts and stipulation for admission of evidence and documents in this matter. No party stipulates to the relevance or materiality of the identified facts or documents, and each party may challenge at any time in these proceedings or on appeal the relevance or materiality of any fact or document. The parties do not necessarily agree with,

and are free to object at any time to, the correctness of any conclusion of law stated or assumed in any of the documents. The parties agree that Exhibits 29 through 32 are admissible only if a protective order is granted.

Subject to the limitations described above and to any specific objections hereinafter made as set forth above, the Exhibits referenced herein are true and correct copies of the documents identified and may be considered by the Court without evidentiary foundation, and all declarations referenced herein will be considered as if the declarants had testified in Court at trial as to the contents of the declarations.

Exhibits 1-23 are the exhibits to the Joint Statement of Stipulated Facts filed in *Arizona Contractors Association, et al. v. Napolitano, et al.*, CV-07-01355-NVW (D. Ariz.) (*Arizona Contractors I*).

1. Plaintiffs the Arizona Contractors Association, Inc., Arizona Employers for Immigration Reform, Inc., Chamber of Commerce of the United States of America, Arizona Chamber of Commerce, Arizona Hispanic Chamber of Commerce, Arizona Farm Bureau Federation, Arizona Restaurant and Hospitality Association, Associated Minority Contractors of America, Arizona Roofing Contractors Association, National Roofing Contractors' Association, Wake Up Arizona! Inc., and Arizona Landscape Contractors' Association are non profit corporations that are associations of members. The aforementioned Plaintiffs are hereinafter referred to collectively as the "Business-Group Plaintiffs".

2. Ten of the 12 Business-Group Plaintiffs and Plaintiffs Chicanos Por La Causa, Inc. and Valle Del Sol, Inc. are incorporated under the laws of the State

of Arizona, with their principal place of business located in the State of Arizona, and hold what are deemed to be licenses under the "Legal Arizona Workers Act" or the "Act". All Business-Group Plaintiffs and Plaintiffs Chicanos Por La Causa, Inc. and Valle Del Sol, Inc. transact business in Arizona.

3. The Chamber of Commerce of the United States of America is incorporated under the laws of the District of Columbia with its principal place of business located in Washington D.C.

4. The National Roofing Contractors Association is incorporated under the laws of Illinois with its principal place of business located in Illinois.

5. Nine of the 12 Business-Group Plaintiffs employ employees within the State of Arizona. Wake Up Arizona! does not have any employees, and the U.S. Chamber of Commerce and the National Roofing Contractors Association do not have employees in Arizona.

6. All 12 Business-Group Plaintiffs are associations of members, serve as a public policy advocate on behalf of their members and urge the Arizona Legislature and Executive Branch to adopt and implement policies that they believe promote a favorable legal and business climate in Arizona for the benefit of their members.

7. On July 2, 2007, Governor Janet Napolitano signed into law the Legal Arizona Workers Act, HB 2779 (hereinafter "LAWA" or the "Act"), a bill passed by the Arizona Legislature on June 20, 2007. A true and correct copy of the LAWA is attached as Exhibit 1.

8. On July 2, 2007, the Governor sent a letter to the Honorable Jim Weiers in his capacity as Speaker of the Arizona House of Representatives, regarding

LAWA. A true and correct copy of the Governor's letter is attached as Exhibit 2.

9. On July 2, 2007, the Governor issued a News Release in connection with the LAWA. A true and correct copy of that News Release is attached as Exhibit 3.

10. On July 2, 2007, the Governor sent a letter concerning the Act to the Honorable Nancy Pelosi, Speaker of the United States House of Representatives, and Senator Harry Reid, Senate Majority Leader, in their capacities as federal legislators and members of the U.S. House of Representatives and the U.S. Senate, respectively. A true and correct copy of the Governor's letter to Speaker Pelosi and Senator Reid is attached as Exhibit 4.

11. The Legal Arizona Workers Act became effective on September 19, 2007, but certain of its provisions did not take effect until January 1, 2008.

12. On or about September 7, 2007, the Administrative Office of the Courts in Arizona proposed a change to the Arizona Rules of Civil Procedure to address actions filed pursuant to the Act. The public comment period on the proposed rule closed November 16, 2007. A true and correct copy of the proposed rule change is attached as Exhibit 5.

13. On or about October 1, 2007, the Arizona Department of Revenue sent a notice about LAWA to Arizona employers. A true and correct copy of the Notice and Declaration of Anthony Forschino concerning the notice from the Department of Revenue are attached as Exhibit 6.

14. The Basic Pilot Program (now E-Verify) was implemented in 1997 in five states: California, Flor-

ida, Illinois, New York, and Texas. Since December 2004, the Basic Pilot Program/E-Verify has been available nationally.

15. Beginning January 1, 2008, the Act requires employers in Arizona to use the federal Basic Pilot Program, which was recently renamed E-Verify.

16. Employers participating in the Basic Pilot Program/E-Verify must, among other requirements, register, comply with the Basic Pilot User Manual, and sign and comply with a Memorandum of Understanding ("MOU") with the Department of Homeland Security, and Social Security Administration. A true and correct copy of the Registration information and the MOU from the Department of Homeland Security website are attached as Exhibit 7. A true and correct copy of the E-Verify User Manual is attached as Exhibit 8.

17. The U.S. Citizenship and Immigration Services has published the document "I am an Employer . . . How do I . . . use E-Verify?" (September 2007), and a true and correct copy of that document is attached as Exhibit 9.

18. A number of reports exist concerning the Basic Pilot Program/E-Verify or issues relating to employee verification and unauthorized employment in the United States including:

- Institute for Survey Research & Westat, INS Basic Pilot Evaluation: Summary Report (Jan. 29, 2002) (attached as Exhibit 10);

- Westat, Findings of the Web Basic Pilot Evaluation (September 2007) (attached as Exhibit 52)[1];
- U.S. Citizenship & Immigration Services, Report to Congress on the Basic Pilot Program (June 2004) (attached as Exhibit 11);
- Social Security Administration, Office of the Inspector General, Audit Report A-14-05-14042, Impact of Unauthorized Employment on Social Security Benefits, (December 2006) (attached as Exhibit 12);
- Social Security Administration, Office of the Inspector General, Congressional Response Report A-03-06-26106, Employer Feedback on the Social Security Administration's Verification Programs (December 2006) (attached as Exhibit 13);
- Social Security Administration, Office of the Inspector General, Congressional Response Report A-08-06-26100, Accuracy of the Social Security Administration's Numident File (December 2006) (attached as Exhibit 14);
- Congressional Research Service, Unauthorized Employment in the United States: Issues and Options, (April 20, 2007) (attached as Exhibit 15).

19. On August 10, 2007, the Director of the Department of Homeland Security and the United States

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[1] Exhibits that were part of the Joint Statement of Stipulated Facts filed in *Arizona Contractors Association, et al. v. Napolitano, et. al.*, CV-07-01355-NVW have been maintained with the same exhibit number for ease of reference. Therefore, exhibits new to this case may not be consecutively numbered.

Commerce Secretary issued a Fact Sheet entitled "Fact Sheet: Improving Border Security and Immigration within Existing Law" and released remarks on border security administrative immigration reform. A true and correct copy of this Fact Sheet and the related remarks are attached as Exhibit 16.

20. On August 13, 2007 Illinois Gov. Rod Blagojevich signed into law Ill. Pub. Act 095-0138, an amendment to the state Right to Privacy in the Workplace Act prohibiting Illinois employers from enrolling in an employment eligibility verification system (EEVS), which would include E-Verify, until the Social Security Administration and the Department of Homeland Security are able to resolve 99% of "tentative nonconfirmation notices" issued to employers within three days. The law becomes effective January 1, 2008. A true and correct copy of Ill. Pub. Act 095-0138 is attached as Exhibit 17.

21. On or about September 24, 2007, the United States filed suit in the Central District of Illinois (CV 07-3261) challenging the constitutionality of Illinois Public Act 095-0138. A true and correct copy of the complaint is attached as Exhibit 18.

22. On September 20, 2007, Maricopa County Attorney Andrew P. Thomas issued a News Release, Thomas and Arpaio to Enforce Employer Sanctions Law, concerning implementation of the Act. A true and correct copy of this news release is attached as Exhibit 19.

23. In March 1990, Charles Bowsher, Comptroller General of the United States submitted a prepared statement regarding "Immigration Reform: Employer Sanctions and the Question of Discrimination" to the Committee on the Judiciary of the United States

Senate. A true and correct copy of this statement is attached as Exhibit 20.

24. The October 4, 2007 declaration of Edmundo Hidalgo, chief operating officer for Chicanos Por La Causa, is attached as Exhibit 21.

25. The September 6, 2007 declaration of Tyler Moran, Employment Policy Director at the National Immigration Law Center, is attached as Exhibit 22.

26. The September 6, 2007 declaration of Edmundo Hidalgo, chief operating officer for Chicanos Por La Causa, is attached as Exhibit 23.

27. The December 12, 2007 declaration of Luz Sarmina, President and Chief Executive Officer of Valle Del Sol, Inc. is attached at Exhibit 24.

28. Exhibit 22 of the Joint Statement of Stipulated Facts from Arizona Contractors I is superseded by Exhibit 25 of this Stipulation, which is an updated December 12, 2007 declaration of Tyler Moran, Employment Policy Director at the National Immigration Law Center (with Exhibits A, B, and K). The exhibits not attached are duplicative of other exhibits to this Joint Statement of Stipulated Facts.

29. The December 21, 2007 declaration of Marion "Mac" Magruder, is attached as Exhibit 26.

30. The December 17, 2007 declaration of Jason LeVecke is attached as Exhibit 27.

31. The December 20, 2007 declaration of Carla Brandt is attached as Exhibit 28.

32. The December 9, 2007 declaration of John Doe I is attached as Exhibit 29.

33. The December 9, 2007 declaration of John Doe II is attached as Exhibit 30.

34. The December 9, 2007 declaration of John Doe III is attached as Exhibit 31.

35. The December 10, 2007 declaration of John Doe IV is attached as Exhibit 32.

36. The January 10, 2008 declaration of Karen C. Reynolds is attached as Exhibit 33.

37. The January 9 2008 declaration of Amy Trojecki is attached as Exhibit 34.

38. The report "Immigrants in Arizona: Fiscal and Economic Impacts" and the declaration of Judith K. Gans, Program Manager for Immigration Policy at the Udall Center for Studies in Public Policy at the University of Arizona are attached as Exhibit 35.

39. The expert report of Marc R. Rosenblum, Ph.D., Associate Professor of Political Science and Robert Dupuy Professor of Pan-American Studies, University of New Orleans, and Fellow, Migration Policy Institute is attached as Exhibit 36.

40. The January 10, 2008 Supplemental Declaration of Judith Gans is attached as Exhibit 37.

41. The expert report and declaration of Giovanni Peri, Ph.D., Associate Professor of Economics, University of California, Berkeley, and Research Fellow at the National Bureau of Economic Research, Cambridge, Massachusetts, is attached as Exhibit 38.

42. The report "Labor Market Consequences of Unauthorized Aliens in Arizona" and January 4, 2008 Affidavit of George Borjas, Robert W. Scrivner Professor of Economics and Social Policy at the John F. Kennedy School of Government, Harvard University, and Research Associate at the National Bureau of Economic Research, are attached as Exhibit 39.

43. The January 10, 2008 Supplemental Affidavit of George Borjas is attached as Exhibit 40.

44. A number of reports and studies exist regarding immigrants and their role and impact in the United States, including those attached to declarations filed elsewhere in this Stipulation of Facts and the following additional studies:

- Congressional Budget Office, U.S. Congress, The Role of Immigrants in the U.S. Labor Market, (Nov. 2005) (attached as Exhibit 41);
- Steven A. Camarota, Center for Immigration Studies, Immigrants in the United States, 2007: A Profile of America's Foreign Born Population (Nov. 2007) (attached as Exhibit 42);
- Bureau of Labor Statistics, U.S. Dept. of Labor, USDL 07-0603, Foreign-Born Workers: Labor Force Characteristics in 2006 (Apr. 25, 2007) (attached as Exhibit 43);
- Michael Hoefer *et al.*, Office of Immigration Statistics, U.S. Dept. of Homeland Security, Estimates of the Unauthorized Immigrant Resident Population Residing in the United States: January 2006 (Aug. 2007) (attached at Exhibit 44);
- U.S. Commission on Immigration Reform, Becoming an American: Immigration and Immigrant Policy (Sept. 1997) (attached as Exhibit 45);
- U.S. Gen. Accounting Office, Illegal Aliens: Influence of Illegal Workers on Wages and Working Conditions of Legal Workers (Mar. 1988) (attached as Exhibit 46);

- *Challenges of Employment Verification and Worksite Enforcement Before the H. Subcomm. on Immigration, Citizenship, Refugees, Border Security, and International Law of the H. Comm. on the Judiciary*, (2007) (statement of Marc R. Rosenblum, Migration Policy Institute) 110th Cong. (2007) (attached as Exhibit 47);
- Steven Raphael & Lucas Ronconi, *The Effects of Labor Market Competition with Immigrants on the Wages and Employment and Natives: What Does Research Tell Us?* 4 Du Bois Review (forthcoming), *available at* http://socrates.berkeley.edu/~raphael/Du%20Bois%20Review%20January%202007.pdf. (attached as Exhibit 48); and
- Giovanni Peri, *How Immigrants Affect California Employment and Wages*, Cal. Counts: Population Trends and Profiles (Pub. Policy Inst. of Cal.), Feb. 2007 (attached as Exhibit 49).

45. Marc R. Rosenblum, Ph.D., Associate Professor of Political Science and Robert Dupuy Professor of Pan-American Studies, University of New Orleans, and Fellow, Migration Policy Institute, provided expert testimony in the case *Lozano v. City of Hazelton*, 6-CV-56-JMM (M.D.Pa.). A true and correct copy of his report is attached as Exhibit 50.

46. The average unemployment rate in Arizona for 2007 was less than 4%. A true and correct copy of a chart "Arizona Unemployment Rate (Seasonally Adjusted): 1976-2007" from the Arizona Department of Economic Security is attached as Exhibit 51.

47. On December 14, 2007, the Arizona Supreme Court adopted proposed changes to the Arizona Rules of Civil Procedure to address actions filed pursuant to

the Legal Arizona Workers Act. A true and correct copy of the Arizona Supreme Court Order adopting Ariz. R. Civ. P. 65.2 is attached as Exhibit 53.

48. On December 17, 2007, Maricopa County Attorney Andrew P. Thomas issued a News Release,. County Attorney Outlines Approach to Enforcing Employer-Sanctions, concerning his approach to enforcing the Legal Arizona Workers Act. A true and correct copy of this news release is attached as Exhibit 54.

49. Maricopa County Attorney Andrew P. Thomas has established a website to provide information regarding the Legal Arizona Workers Act (www.maricopacountyattorney.org/lawa). The website allows people to file complaints electronically by completing an online form. Complaints may be made anonymously. True and correct copies of the main website pages are attached as Exhibit 55.

50. Pinal County Attorney James P. Walsh has established procedures for accepting complaints pursuant to the Legal Arizona Workers Act. He has posted information on the Legal Arizona Workers Act on her website (http://co.pinal.az.us/Attorney/index.asp). Complaints must contain the complainants name and be made under oath. True and correct copies of the pamphlet and complaint forms provided by the Pinal County Attorney are attached as Exhibit 56.

51. Pima County Attorney Barbara LaWall has established procedures for accepting complaints pursuant to the Legal Arizona Workers Act. She has posted information on the Legal Arizona Workers Act on her website (http://www.pcao.pima.gov/). Complaints must contain the complainants name and be

made under oath. True and correct copies of the pamphlet and complaint forms provided by the Pima County Attorney are attached as Exhibit 57.

52. Yavapai County Attorney Sheila Polk has established procedures for accepting complaints pursuant to the Legal Arizona Workers Act. She has posted information on the Legal Arizona Workers Act on his website (http://www.co.yavapai.az.us/Content.aspx?id=31518). Complaints must contain the complainants name and the complainant must sign an affirmation that the information contained in the complaint is true and correct. True and correct copies of the pamphlet and complaint forms provided by the Yavapai County Attorney are attached as Exhibit 58.

53. On February 8, 2007, Representative Russell Pearce and others introduced HB 2779. A true and correct copy of HB 2779 as introduced is attached as Exhibit 59.

54. On December 31, 2007, the U. S. Department of Homeland Security issued a Notice for Illinois Employers about E-Verify and the U.S. government's lawsuit to enjoin the Illinois law prohibiting Illinois employers from using E-Verify. A true and correct copy of the Notice is attached as Exhibit 60.

55. On December 12, 2007, the U.S. and the State of Illinois agreed to stay the proceedings in the case of *U.S. v. Illinois*, CV-07-3261 (C.D. Ill. 2007), the U.S. government's lawsuit to enjoin the law prohibiting Illinois employers from using E-Verify. On December 14, 2007 the Court entered an Order allowing the Stipulation. A true and correct copy of the parties' stipulation is attached as Exhibit 61.

RESPECTFULLY SUBMITTED this 11th day of January, 2008.

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Exhibit No.	Date	Title/Author (if applicable)
1	07/02/07	Legal Arizona Workers Act, H.B. 2779 (2007).
2	07/02/07	Letter from Hon. Janet Napolitano, Governor of Ariz., to Hon. Jim Weiers, Speaker of Ariz. House of Representatives (July 2, 2007).
3	07/02/07	Press Release, Hon. Janet Napolitano, Governor of Ariz., Governor Signs Employer Sanctions Bill (July 2, 2007).
4	07/02/07	Letter from Hon. Janet Napolitano, Governor of Ariz., to Hon. Nancy Pelosi, Speaker of the US House of Representatives (July 2, 2007).
5	09/07/07	Petition to Add Rule 65.2, Ariz. R. Civ. Pro., Administrative Offices of the Courts of Ariz. (Proposed Sept. 9, 2007).
6	10/01/07	Notice and Declaration of Anthony Forschino, Arizona Department of Revenue.
7	10/26/07	Registration for E-verify, https://www.vis-dhs.com/EmployerRegistration/StartPage.aspx?JS=YES (last visited Jan. 10, 2008); The E-Verify Program for Employment Verification Memorandum of Understanding, https://www.vis-dhs.com/EmployerRegistration/StartPage.aspx?JS=YES (last visited Jan. 10, 2008).

Exhibit No	Date	Title/Author (if applicable)
8	9/24/07	E-Verify User Manual, U.S. Citizenship and Immigration Services (Sept. 24, 2007).
9	09/2007	"I am an Employer . . . How do I . . . use E-Verify?," at http://www.uscis.gov/files/nativedocuments/E4_english.pdf.
10	01/29/02	Institute for Survey Research & Westat, INS Basic Pilot Evaluation: Summary Report (Jan. 29, 2002).
11	06/2004	U.S. Citizenship & Immigration Services, Report to Congress on the Basic Pilot Program (June 2004).
12	12/2006	Social Security Administration, Office of the Inspector General, Audit Report A-14-05-14042, Impact of Unauthorized Employment on Social Security Benefits, (December 2006).
13	12/2006	Social Security Administration, Office of the Inspector General, Congressional Response Report A-03-06-26106, Employer Feedback on the Social Security Administration's Verification Programs (December 2006).
14	12/2006	Social Security Administration, Office of the Inspector General, Congressional Response Report A-08-06-26100, Accuracy of the Social Security Administration's Numident File (December 2006).

Exhibit No	Date	Title/Author (if applicable)
15	04/20/07	Congressional Research Service, Unauthorized Employment in the United States: Issues and Options, (April 20, 2007).
16	08/10/07	"Fact Sheet: Improving Border Security and Immigration within Existing Law," Director of the Dept. of Homeland Security and the U.S. Commerce Secretary, http://www.whitehouse.gov/news/releases/2007/08/20070810.html (last visited Jan. 10, 2008).
17	08/13/07	Illinois Pub. Act 095-0138, an Amendment to the state Right to Privacy in the Workplace Act.
18	09/24/07	Complaint. *U.S. v. Illinois*, CV 07-3261 (C.D. Ill. Sept. 25, 2007) challenging constitutionality of Illinois Public Act 095-0138 filed by United States.
19	09/20/07	Press Release, Andrew P. Thomas, Maricopa County Attorney, Thomas and Arpaio to Enforce Employer Sanctions Law (Sept. 20, 2007).
20	03/30/90	*Immigration Reform: Employer Sanctions and the Question of Discrimination Before the S. Comm. on the Judiciary* (1990) (statement of Charles Bowsher, Comptroller General of the U.S.) 102d Cong. (1990).

Exhibit No	Date	Title/Author (if applicable)
21	10/04/07	Supplemental Declaration of Edmundo Hidalgo, chief operating officer for Chicanos Por La Causa.
22	09/06/07	Sept. 6, 2007 Declaration of Tyler Moran, Employment Policy Director at National Immigration Law Center.
23	09/06/07	Declaration of Edmundo Hidalgo, chief operating officer for Chicanos Por La Causa.
24	12/12/07	Declaration of Luz Sarmina, president and chief executive officer of Valle Del Sol, Inc.
25	12/12/07	Dec. 12, 2007 Declaration of Tyler Moran, Employment Policy Director at National Immigration Law Center.
26	12/21/07	Declaration of Marion "Mac" Magruder.
27	12/17/07	Declaration of Jason LeVecke.
28	12/20/07	Declaration of Carla Brandt.
29	12/09/07	Declaration of John Doe I (admissible only if a protective order is granted).
30	12/09/07	Declaration of John Doe II (admissible only if a protective order is granted).
31	12/09/07	Declaration of John Doe III (admissible only if a protective order is granted).

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32	12/10/07	Declaration of John Doe IV (admissible only if a protective order is granted).
33	01/10/08	Declaration of Karen C. Reynolds.
34	1/09/08	Declaration of Amy Trojecki.
35	10/2007	Report "Immigrants in Arizona: Fiscal and Economic Impacts" and Declaration of Judith K. Gans, Program Manager for Immigration Policy at Udall Center for Studies in Public Policy, University of Arizona.
36	12/28/07	Expert Report of Marc R. Rosenblum, Ph.D., Associate Professor of Political Science and Robert Dupuy Professor of Pan-American Studies, University of New Orleans, and Fellow, Migration Policy Institute.
37	1/10/08	Supplemental Declaration of Judith Gans.
38	1/10/08	Expert Report and declaration of Giovanni Peri, Ph.D., Associate Professor of Economics, University of California, Berkeley, and Research Fellow at the National Bureau of Economic Research, Cambridge, Massachusetts.

Exhibit No	Date	Title/Author (if applicable)
39	01/04/08	Affidavit and attached Report "Labor Market Consequences of Unauthorized Aliens in Arizona" of George Bojas, Robert W. Scrivner Professor of Economics and Social Policy, John F. Kennedy School of Government, Harvard University.
40	1/10/08	Supplemental Affidavit of George Bojas.
41	11/2005	Congressional Budget Office, U.S. Congress, The Role of Immigrants in the U.S. Labor Market, (Nov. 2005).
42	11/2007	Steven A. Camarota, Center for Immigration Studies, Immigrants in the United States, 2007: A Profile of America's Foreign Born Population.
43	04/25/07	Bureau of Labor Statistics, U.S. Dept. of Labor, USDL 07-0603, Foreign-Born Workers: Labor Force Characteristics in 2006 (Apr. 25, 2007).
44	08/2007	Michael Hoefer *et al.*, Office of Immigration Statistics, U.S. Dept. of Homeland Security, Estimates of the Unauthorized Immigrant Resident Population Residing in the United States: January 2006 (Aug. 2007).

Exhibit No	Date	Title/Author (if applicable)
45	09/1997	U.S. Commission on Immigration Reform, Becoming an American: Immigration and Immigrant Policy (Sept. 1997).
46	03/30/88	U.S. Gen. Accounting Office, Illegal Aliens: Influence of Illegal Workers on Wages and Working Conditions of Legal Workers (Mar. 1988).
47	04/24/07	*Challenges of Employment Verification and Worksite Enforcement Before the H. Subcomm. on Immigration, Citizenship, Refugees, Border Security, and International Law of the H. Comm. on the Judiciary*, (2007) (statement of Marc R. Rosenblum, Migration Policy Institute) 110th Cong. (2007).
48	01/2007	Steven Raphael & Lucas Ronconi, *The Effects of Labor Market Competition with Immigrants on the Wages and Employment and Natives: What Does Research Tell Us?* 4 Du Bois Review (forthcoming), *available at* http://socrates.Berkeley.edu/~raphael/Du%20Bois%20Review%20January%202007.pdf.
49	02/2007	Giovanni Peri, *How Immigrants Affect California Employment and Wages*, Cal. Counts: Population Trends and Profiles (Pub. Policy Inst. of Cal.), Feb. 2007.

Exhibit No	Date	Title/Author (if applicable)
50		Expert Report of Marc R. Rosenblum, Ph.D., *Lozano v. City of Hazelton*, 6-CV-56-JMM (M.D. Pa.).
51	12/20/07	Arizona Unemployment Rate Chart, Arizona Department of Economic Security.
52	09/2007	Westat, Findings of the Web Basic Pilot Evaluation (September 2007).
53	12/14/07	Arizona Supreme Court Order adopting Ariz.R.Civ.P. 65.2.
54	12/17/07	Press Release, Andrew P. Thomas, Maricopa County Attorney, County Attorney Outlines Approach to Enforcing Employer-Sanctions (Dec. 17, 2007).
55	12/27/07 &1/09/08	Maricopa County Attorney Andrew P. Thomas Website pages regarding Legal Arizona Workers Act, www.maricopacountyattorney.org/lawa.
56	12/27/07	Pinal County Attorney James P. Walsh, Pamphlet and Complaint Forms regarding Legal Arizona Workers Act.
57	12/27/07	Pima County Attorney Barbara LaWall, Pamphlet and Complaint Forms regarding Legal Arizona Workers Act.

Exhibit No	Date	Title/Author (if applicable)
58	12/27/07	Yavapai County Attorney Sheila Polk, Pamphlet and Complaint Forms regarding Legal Arizona Workers Act.
59	02/08/07	HB 2779 Introduced (Feb. 8, 2007).
60	12/31/07	Notice for Illinois Employers about E-Verify, U.S. Dept. of Homeland Security, *at* http://www.uscis.gov/files/pressrelease/Illinois_Everify_31dec07.pdf.
61	12/12/07	Jt. Stip. and Motion to Stay Proceedings. *U.S. v. Illinois*, CV 07-3261 (C.D. Ill. Dec. 12, 2007)

EXHIBIT 2

[Seal]

STATE OF ARIZONA

OFFICE OF THE GOVERNOR
1700 West Washington Street,
Phoenix, AZ 85007

Janet Napolitano
Governor

Main Phone: 602-542-4331
Facsimile: 602-542-7601

July 2, 2007

The Honorable Jim Weiers
Speaker of the House
Arizona House of Representatives
1700 West Washington
Phoenix, Arizona 85007

Re: House Bill 2779: fair and legal employment

Dear Speaker Weiers:

Today I signed House Bill 2779, the Legal Arizona Workers Act.

With my signature on this bill, Arizona has taken the most aggressive action in the country against employers who knowingly or intentionally hire undocumented workers. Unlike House Bill 2577 from last session, which I vetoed because it offered employer amnesty and indemnification, this bill imposes tough consequences on those who knowingly employ undocumented workers.

Immigration is a federal responsibility, but I signed House Bill 2779 because it is now abundantly clear that Congress finds itself incapable of coping with the comprehensive immigration reforms our country needs. I signed it, too, out of the realization that the

flow of illegal immigration into our state is due to the constant demand of some employers for cheap, undocumented labor.

In our desire to stop illegal immigration, however, we must not overlook some drafting problems and omissions in House Bill 2779. We must not harm legitimate Arizona employers and employees as we seek to curb illegal employment practices. The problems in House Bill 2779 include the following:

- The bill lacks an antidiscrimination clause to ensure that it is enforced in a fair and nondiscriminatory manner. Federal and state law preclude employment discrimination against Arizonans on the basis of race or national origin and this bill can and must be enforced in a way to ensure that no lawful worker faces discrimination on these bases. Indeed, even in the absence of a legislative fix on this issue, I will call upon my Office of Equal Employment Opportunity and the Attorney General's Civil Rights Division to actively promote efforts to educate employers on how to implement this bill fairly and to aggressively prosecute cases of discrimination that may arise.

- Unlike earlier draft amendments, the final version of House Bill 2779 omits the license revocation exception for businesses servicing critical infrastructure. Despite our compelling interest in ensuring fair and legal employment, it is not in the state's best interest to close hospitals, power plants and other similarly critical businesses because of wrongful employment decisions. Other sanctions should be explored.

- The bill's license revocation provisions are also overly broad to the extent that they are susceptible to an interpretation requiring the closure of multiple locations or franchises of a business based solely on the wrongful hiring practices of one location. The legislature should preclude such a result.

- This bill provides woefully inadequate funding for the law enforcement agencies charged with enforcing it. The Attorney General's Office in particular is underfunded by the bill. The $100,000 appropriated to that office will be inadequate for it to meet its obligations of both developing the extensive database required and investigating complaints. More funding is needed for those purposes as well as to ensure that the Civil Rights Division has sufficient resources to guarantee that the law is enforced in a non-discriminatory manner. The $70,000 appropriated for employer notification is also inadequate.

- Finally, I note that House Bill 2779 contains an important typographical error that must be corrected. On page 6, line 14, the bill cites 8 U.S.C. § 1324b for the purposes of establishing a rebuttable persumption for employers who comply with federal employment verification procedures. The correct cite should be to 8 U.S.C. § 1324a (b).

Because of these infirmities, and because many employers have told me either that they did not have sufficient time to let the legislature know of their concerns with the *final* version of House Bill 2779 or that their concerns were not given thorough consideration, I am willing to call the legislature into

special session this fall to enable it to fix this bill before its January 1, 2008 effective date. As Representative Pearce and Senator Burns acknowledged in a June 28, 2007 letter to the "Notwithstanding all our efforts, we understand that no bill is perfect and changes may be needed as the bill is implemented. For that reason, we believe that dealing with this issue through the legislative process is preferable to the initiative process." I agree, but I believe some changes to this bill are needed even before it becomes effective. The date of the special session will be determined after I have had the opportunity to consult legislative leadership. The special session will be aimed at clarifications, omissions, and corrections, *not* at undercutting the underlying strength of House Bill 2779.

Because of Congress' failure to act, states like Arizona have no choice but to take strong action to discourage the further flow of illegal immigration through our borders. I renew my call to Congress to enact comprehensive immigration reform legislation. Now that Arizona has acted, other states are likely to follow. For our country to have a uniform and uniformly enforced immigration law, the United States Congress must act swiftly and definitively to solve this problem at the national level.

Yours very truly,

/s/ Janet Napolitano
Janet Napolitano
Governor

JN:TAN/jm

cc: The Honorable Timothy Bee
The Honorable Russell K. Pearce

EXHIBIT 3

[SEAL]

STATE OF ARIZONA
EXECUTIVE OFFICE
JANET NAPOLITANO
GOVERNOR
www.azgovernor.gov

NEWS RELEASE
For More Information
Contact:
Press Office
(602) 542-1342

FOR IMMEDIATE RELEASE
Monday, July 2, 2007

GOVERNOR SIGNS EMPLOYER SANCTIONS BILL

PHOENIX – Governor Janet Napolitano today has signed a tough, new law that imposes penalties on employers who hire illegal immigrants. At the same time, the Governor announced she is willing to call for a special session of the Arizona State Legislature to repair defects in the bill.

In a written statement accompanying House Bill 2779, the Governor said she took the tandem action because Congress has failed miserably. She wrote, "Immigration is a federal responsibility, but I signed HB 2779 because it is now abundantly clear that Congress finds itself incapable of coping with the comprehensive immigration reforms our country needs. I signed it, too, out of the realization that the flow of illegal immigration into our state is due to the constant demand of some employers for cheap, undocumented labor."

House Bill 2779 takes the most aggressive action in the country against employers who knowingly or intentionally hire undocumented workers. The new law requires employers to verify that the people

they employ are present in the country legally; knowing or intentional failure to do so will cause the employer's business licenses to be suspended. A second offense can result in the "business death penalty" – permanent revocation of an employer's licenses to do business in Arizona.

Yet, the bill also contains flaws that must be addressed:

- The bill should protect critical infrastructure. Hospitals, nursing homes and power plants could be shut down for days because of a single wrongful employment decision.
- The revocation provision is overbroad, and could cause a business with multiple locations to face shutdown of its entire operation based on an infraction that occurred at only one location.
- The bill is underfunded. Even though the Attorney General's office must establish an entirely new database and must investigate complaints statewide, only $100,000 is appropriated for that purpose. Only $70,000 is appropriated to notify employers of the change in the law.
- There is no expressed provision protecting Arizona citizens or legal residents from discrimination under the terms of this bill.
- There is even a typo that has to be fixed. The bill cites the wrong portion of a federal law.

The Governor wrote, "We must not harm legitimate Arizona employers and employees as we seek to curb illegal employment practices."

The bill's provisions do not take effect until January of 2008, allowing ample time for the state legislature to pass the necessary improvements to the law. The Governor is willing to call for a special session to occur sometime this fall, but will not set the specific date until she has had the opportunity to consult with legislative leaders. The purpose of the special session will be clear: to correct and clarify the law, not to undercut it

Today, the Governor also signed Senate Bill 1265 and House Bill 2467. SB 1265 deals with bail for illegal immigrants. Under the law, courts must deny bail to those charged with a felony and who are believed to be in the country illegally. This bill conforms Arizona law more closely to federal law, and aligns with the intent of Proposition 100 passed by voters last year.

HB 2467 requires individuals to show documentation of legal citizenship to receive state services, per the provisions of Proposition 200, which was approved by voters in 2004.

Along with signing 2779, the Governor also sent a letter to U.S. Senate Majority Leader Harry Reid, and Speaker of the House Nancy Pelosi. In it, she asks for improvements to the 'Basic Pilot' program – the federal database used to verify legal status.

The Governor has directed Leesa Morrison, Director of the Arizona Department of Homeland Security, and Roger Vanderpool, Director of the Arizona Department of Public Safety, to intensify efforts related to intercept fraudulent documents used in the business of illegal immigration, and to conduct training with businesses to aid them in detecting fraudulent documents.

Finally, in a letter to the Special Agent in Charge for Immigration and Customs Enforcement in Arizona, Alonzo Peña, the Governor asked that the state be notified when his officers encounter evidence of employers knowingly or intentionally employing illegal immigrants.

Copies of the signing statements and letters are attached.

For more information about the Office of the Governor, please visit www.azgovemor.gov.

EXHIBIT 4

[SEAL]

STATE OF ARIZONA

OFFICE OF THE GOVERNOR
1700 West Washington Street,
Phoenix, AZ 85007

Janet Napolitano
Governor

Main Phone: 602-542-4331
Facsimile: 602-542-7601

July 2, 2007

The Hon. Nancy Pelosi
United States House of Representatives
235 Cannon House Office Building
Washington, D.C. 20515-0508

The Hon. Harry Reid
United States Senate
528 Hart Senate Office Building
Washington, D.C. 20510-2803

Dear Speaker Pelosi and Majority Leader Reid:

Last week, the Senate once again failed to take action on comprehensive immigration reform. One of the practical effects of this failure is that Arizona, and states across the nation, must now continue to address this escalating problem on their own.

For years now, Arizona has been forced to act independently to stem the flow of illegal immigration. The latest example is House Bill 2779, the Legal Arizona Workers Act, which I signed into law today.

House Bill 2779 is the most aggressive state enforcement action in the country against employers who knowingly or intentionally employ unauthorized aliens. Effective January 1, 2008, this new law

requires Arizona employers to use the federal government's Basic Pilot Program (BPP) or its successor program, to verify the employment authorization of all newly hired employees. As you know, the BPP currently accommodates fewer than 15,000 businesses nationwide. With this new state mandate, Arizona will add 130,000-150,000 new businesses to the BPP, which could strain the system. Under House Bill 2779, an employer's usage of the BPP will offer some protections against the bill's sanctions if an employers [sic] is found to have employed an unauthorized alien. This will be an incentive for employers to use the BPP.

In light of Arizona's new law and the likely legislation that will result in states across the country, I urge you to promptly review the current BPP to ensure that it is capable of handling the increase in usage that will result next year from Arizona's decisive action today. It is the federal government's obligation to ensure seamless access and availability to employers throughout the nation. Congress should also supply any additional funding that may be needed to modernize and perfect the system.

For years now, I have spoken out on the desperate need for comprehensive immigration reform. Today, I renew my call on Congress to enact such legislation. The United States Congress has a responsibility to act swiftly and definitively to solve this problem at the national level.

Yours very truly,

/s/ Janet Napolitano
Janet Napolitano
Governor

JN/TN:jm

EXHIBIT 6

IN THE UNITED STATES DISTRICT COURT
DISTRICT OF ARIZONA

No. CV07-01355-PBX NVW
No. CV07-01684-PHX NVW
Consolidated
(Assigned to the Honorable Neil V. Wake)

ARIZONA CONTRACTORS ASSOCIATION, INC., an Arizona non-profit corporation, *et al.*,
Plaintiffs,

v.

JANET NAPOLITANO, *et al.*,
Defendants.

CHICANOS POR LA CAUSA, INC.; and SOMOS AMERICA,
Plaintiffs,

v.

JANET NAPOLITANO, *et al.*,
Defendants.

DECLARATION OF ANTHONY CHARLES FORSCHINO

Anthony Charles Forschino declares:

1. I am the Assistant Director of the External Services and Special Projects Division of the Arizona Department of Revenue.

2. In my capacity as Assistant Director of the External Services and Special Projects Division of the Arizona Department of Revenue, I

was responsible for overseeing that the notice to employers required by section 3 of HB 2779, 2007 Ariz. Sess. Laws, ch. 279 were delivered to SOURCECORP to be mailed to employers registered with the Arizona Department of Revenue for withholding tax purposes.

3. The Arizona Department of Revenue has contracted with SOURCECORP since 2002 to print and mail large volume notices for the Department.

4. Attached to this Declaration is a true and accurate copy of the notice that was delivered to SOURCECORP by the Arizona Department of Revenue to be printed and mailed on October 1, 2007 to 144,386 employers.

5. I contacted SOURCECORP and confirmed with Gary Moore that the notices were mailed on October 1, 2007.

I declare under penalty of perjury that the foregoing assertions of fact are true and correct.

Executed on October 11, 2007, at Phoenix, Arizona.

/s/ Anthony Charles Forschino
Anthony Charles Forschino
Assistant Director
Arizona Department of Revenue

NOTICE TO EMPLOYERS
Laws 2007 Chapter 279
Fair and Legal Employment (HB 2779)

On January 1, 2008, a new state law prohibits employers from intentionally or knowingly employing an unauthorized alien. An "unauthorized alien" is an alien who does not have the legal right or authorization under federal law to work in the United States.

If a complaint is filed with the County Attorneys or Attorney General an investigation will be conducted. Upon determining that a complaint is not frivolous, a civil action may be instituted. Any judicial proceedings will be governed by the Rules of Civil Procedure.

A judicial determination of a violation of this new state law will subject the employer to probation, and may subject the employer to a suspension or revocation of all licenses as defined in section 23-211, Arizona Revised Statutes depending on the following conditions:

1. For a first violation of an employer *knowingly* hiring an unauthorized alien, the court shall order mandatory three years probation and may suspend all licenses held by the employer for a maximum of ten days. The employer must file a signed sworn affidavit with the county attorney within three business days, stating that the employer has fired all unauthorized aliens and that the employer will not intentionally or knowingly employ any unauthorized alien.

2. For a first violation of an employer *intentionally* hiring an unauthorized alien, the court shall order a mandatory five years probation and order the appropriate licensing agencies

to suspend all licenses held by the employer for a minimum of ten days. The employer must file a signed sworn affidavit, stating that the employer has fired all unauthorized aliens and that the employer will not intentionally or knowingly employ any unauthorized alien with the county attorney. A license that is suspended will remain suspended until the employer files a signed sworn affidavit.

3. For a second violation of this new state law committed during a period of probation, the court will order the appropriate licensing agencies to permanently revoke all licenses that are held by the employer.

All court orders will be available on the Attorney Generals website at www.azag.gov.

Employment Eligibility Verification (E-Verify)

E-Verify is the new name for the employment eligibility verification formerly known as the Basic Pilot Program. After December 31, 2007, every employer, after hiring an employee, is required to verify the employment eligibility of the new employee through the E-Verify program, as defined in section 23-211, Arizona Revised Statutes, as added by this act. Proof of verifying the employment authorization of an employee through the E-Verify program will create a rebuttable presumption that an employer did not violate the state law.

How to Enroll

E-verify is available on the Internet for all U.S. employers seeking to verify the employment eligibility of new hires. Employers using E-Verify must first

register online and sign a Memorandum of Understanding (MOU) with the United States Citizenship and Immigration Service (USCIS) and the Social Security Administration (SSA). There is no cost to use E-Verify. To register and complete a MOU for participation in the Employment Eligibility Verification (EEV) go to https://www.vis-clhs.com/EmployerRegistration, and follow the instructions as outlined.

Upon completion and online submittal of the MOU, the employer will receive email confirmation of his or her company's participation in the E-Verify including a new User ID and temporary password.

You can obtain a copy of the fair and legal employment act (HB 2779; Laws 2007, Chapter 279) at www.azleg.gov.

EXHIBIT 7

E-VERIFY Employment Eligibility Verification

[SEAL] [SEAL]

Registration for E-Verify

The Department of Homeland Security's (DHS) U.S. Citizenship and Immigration Services Bureau (USCIS) and the Social Security Administration (SSA) are jointly conducting E-Verify, formerly known as the Basic Pilot. E-Verify involves verification checks of the SSA and DHS databases, using an automated system to verify the employment authorization of all newly hired employees.

There are four types of access methods for E-Verify.

Employer

The Employer access method is a web-based program that provides a company with a way to electronically verify the employment authorization of *all* newly hired employees, regardless of citizenship.

Designated Agent

The Designated Agent access method is a web-based program available to companies (Designated Agents) to verify the employment authorization of all newly hired employees *on behalf of other companies* (Client Companies),

Corporate Administrator

The Corporate Administrator access method is a web-based program that provides companies with multiple sites using E-Verify, the functionality to create and manage multiple Employer accounts for those sites under the jurisdiction of a Corporate Office. Corporate Administrators have oversight of

these company accounts. They are provided the ability to view reports and administer new and existing user accounts. The Corporate Administrator access method *cannot* perform employment eligibility verifications for newly hired employees. To verify the employment eligibility for your Corporate Office's newly hired employees, the Corporate Office needs to also register for the Employer access method.

Web-Services

The Web-Service access method allows a company to extract information from the company's existing system or an electronic Form I-9 and transmit the data to SSA and USCIS to verify the employment authorization of newly hired employees. The web-services access method *requires your company to develop software* to interface between your company's system and USCIS' database.

An employer's participation in E Verify is voluntary and is currently free to employers.

Users can access the web-based access methods using any Internet-capable Windows based personal computer and a web browser of Internet Explorer 5.5 or Netscape 4.7 or higher (with the exception of Netscape 7.0).

To participate, an employer must register online and accept the electronic Memorandum of Understanding (MOU) that sets forth the responsibilities of the SSA, USCIS and the employer.

If your company wants to participate in E-Verify, as an employer, designated agent, or corporate administrator, or if your company is interested in the web-service access method, click the "Begin Employment Verification Registration" button shown below.

If you need assistance in completing the registration process or need additional information relating to E-Verify, please call the Office of Verification toll free at 1-888-464-4218.

[Begin Employment Verification Registration Button]

THE E-VERIFY PROGRAM FOR EMPLOYMENT VERIFICATION

MEMORANDUM OF UNDERSTANDING

ARTICLE I

PURPOSE AND AUTHORITY

This Memorandum of Understanding (MOU) sets forth the points of agreement between the Social Security Administration (SSA), the Department of Homeland Security (DHS) and _____ (Employer) regarding the Employer's participation in the Employment Eligibility Verification Program (E-Verify). E-Verify is a program in which the employment eligibility of all newly hired employees will be confirmed after the Employment Eligibility Verification Form (Form I-9) has been completed.

Authority for the E-Verify program is found in Title IV, Subtitle A, of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), Pub. L. 104-208, 110 Stat. 3009, as amended (8 U.S.C. § 1324a note).

ARTICLE II

FUNCTIONS TO BE PERFORMED

A. RESPONSIBILITIES OF THE SSA

1. Upon completion of the Form I-9 by the employee and the Employer, and provided the Employer complies with the requirements of this MOU, SSA agrees to provide the Employer with available information that allows the Employer to confirm the accuracy of Social Security Numbers provided by all newly hired employees and the employment authorization of U.S. citizens.

2. The SSA agrees to provide to the Employer appropriate assistance with operational problems that may arise during the Employer's participation in the E-Verify program. The SSA agrees to provide the Employer with names, titles, addresses, and telephone numbers of SSA representatives to be contacted during the E-Verify process.

3. The SSA agrees to safeguard the information provided by the Employer through the E-Verify program procedures, and to limit access to such information, as is appropriate by law, to individuals responsible for the verification of Social Security Numbers and for evaluation of the E-Verify program or such other persons or entities who may be authorized by the SSA as governed by the Privacy Act (5 U.S.C. § 552a), the Social Security Act (42 U.S.C. 1306(a)), and SSA regulations (20 CFR Part 401).

4. SSA agrees to establish a means of automated verification that is designed (in conjunction with DHS's automated system if necessary) to provide confirmation or tentative nonconfirmation of U.S. citizens' employment eligibility and accuracy of SSA records for both citizens and aliens within 3 Federal Government work days of the initial inquiry.

5. SSA agrees to establish a means of secondary verification (including updating SSA records as may be necessary) for employees who contest SSA tentative nonconfirmations that is designed to provide final confirmation or nonconfirmation of U.S. citizens' employment eligibility and accuracy of SSA records for both citizens and aliens within 10 Federal Government work days of the date of referral to SSA, unless SSA determines that more than 10 days may

be necessary. In such cases, SSA will provide additional verification instructions.

B. RESPONSIBILITIES OF THE DEPARTMENT OF HOMELAND SECURITY

1. Upon completion of the Form I-9 by the employee and the Employer and after SSA verifies the accuracy of SSA records for aliens through E-Verify, DHS agrees to provide the Employer access to selected data from DHS's database to enable the Employer to conduct:

- Automated verification checks on newly hired alien employees by electronic means, and
- Photo verification checks (when available) on newly hired alien employees.

2. DHS agrees to provide to the Employer appropriate assistance with operational problems that may arise during the Employer's participation in the E-Verify program. DHS agrees to provide the Employer names, titles, addresses, and telephone numbers of DHS representatives to be contacted during the E-Verify process.

3. DHS agrees to provide to the Employer a manual (the E-Verify Manual) containing instructions on E-Verify policies, procedures and requirements for both SSA and DHS, including restrictions on the use of E-Verify. DHS agrees to provide training materials on E-Verify.

4. DHS agrees to provide to the Employer a notice, which indicates the Employer's participation in the E-Verify program. DHS also agrees to provide to the Employer anti-discrimination notices issued by the Office of Special Counsel for Immigration-Related

Unfair Employment Practices (OSC), Civil Rights Division, and U.S. Department of Justice.

5. DHS agrees to issue the Employer a user identification number and password that permits the Employer to verify information provided by alien employees with DHS's database.

6. DHS agrees to safeguard the information provided to DHS by the Employer, and to limit access to such information to individuals responsible for the verification of alien employment eligibility and for evaluation of the E-Verify program, or to such other persons or entities as may be authorized by applicable law. Information will be used only to verify the accuracy of Social Security Numbers and employment eligibility, to enforce the Immigration and Nationality Act and federal criminal laws, and to ensure accurate wage reports to the SSA.

7. DHS agrees to establish a means of automated verification that is designed (in conjunction with SSA verification procedures) to provide confirmation or tentative nonconfirmation of employees' employment eligibility within 3 Federal Government work days of the initial inquiry.

8. DHS agrees to establish a means of secondary verification (including updating DHS records as may be necessary) for employees who contest DHS tentative nonconfirmations and photo non-match tentative nonconfirmations that is designed to provide final confirmation or nonconfirmation of the employees' employment eligibility within 10 Federal Government work days of the date of referral to DHS, unless DHS determines that more than 10 days may be necessary. In such cases, DHS will provide additional verification instructions.

C. RESPONSIBILITIES OF THE EMPLOYER

1. The Employer agrees to display the notices supplied by DHS in a prominent place that is clearly visible to prospective employees.

2. The Employer agrees to provide to the SSA and DHS the names, titles, addresses, and telephone numbers of the Employer representatives to be contacted regarding E-Verify.

3. The Employer agrees to become familiar with and comply with the E-Verify Manual.

4. The Employer agrees that any Employer Representative who will perform employment verification queries will complete the E-Verify Tutorial before that individual initiates any queries.

A. The employer agrees that all employer representatives will take the refresher tutorials initiated by the E-Verify program as a condition of continued use of E-Verify.

B. Failure to complete a refresher tutorial will prevent the employer from continued use of the program.

5. The Employer agrees to comply with established Form I-9 procedures, with two exceptions:

- If an employee presents a "List B" identity document, the Employer agrees to only accept "List B" documents that contain a photo. (List B documents identified in 8 C.F.R. § 274a.2(b)(1)(B)) can be presented during the Form I-9 process to establish identity).
- If an employee presents a DHS Form I-551 (Permanent Resident Card) or Form I-766 (Employment Authorization Document) to

complete the Form I-9, the Employer agrees to make a photocopy of the document and to retain the photocopy with the employee's Form I-9. The employer will use the photocopy to verify the photo and to assist the Department with its review of photo non-matches that are contested by employees. Note that employees retain the right to present any List A, or List B and List C, documentation to complete the Form I-9. DHS may in the future designate other documents that activate the photo screening tool.

6. The Employer understands that participation in E-Verify does not exempt the Employer from the responsibility to complete, retain, and make available for inspection Forms I-9 that relate to its employees, or from other requirements of applicable regulations or laws, except for the following modified requirements applicable by reason of the Employer's participation in E-Verify. (1) identity documents must have photos, as described in paragraph 5 above; (2) a rebuttable presumption is established that the Employer has not violated section 274A(a)(1)(A) of the Immigration and Nationality Act (INA) with respect to the hiring of any individual if it obtains confirmation of the identity and employment eligibility of the individual in compliance with the terms and conditions of E-Verify; (3) the Employer must notify DHS if it continues to employ any employee after receiving a final nonconfirmation, and is subject to a civil money penalty between $500 and $1,000 for each failure to notify DHS of continued employment following a final nonconfirmation; (4) the Employer is subject to a rebuttable presumption that it has knowingly employed an unauthorized alien in violation of section 274A(a)(1)(A) if the Employer

continues to employ any employee after receiving a final nonconfirmation; and (5) no person or entity participating in E-Verify is civilly or criminally liable under any law for any action taken in good faith on information provided through the confirmation system. DHS reserves the right to conduct Form I-9 compliance inspections during the course of E-Verify, as well as to conduct any other enforcement activity authorized by law.

7. The Employer agrees to initiate E-Verify verification procedures within 3 Employer business days after each employee has been hired (but after both sections 1 and 2 of the Form I-9 have been completed), and to complete as many (but only as many) steps of the E-Verify process as are necessary according to the E-Verify Manual. The Employer is prohibited from initiating verification procedures before the employee has been hired and the Form I-9 completed. If the automated system to be queried is temporarily unavailable, the 3-day time period is extended until it is again operational in order to accommodate the Employer's attempting, in good faith, to make inquiries during the period of unavailability. In all cases, the Employer must use the SSA verification procedures first, and use DHS verification procedures and photo screening tool only after the the SSA verification response has been given.

8. The Employer agrees not to use E-Verify procedures for pre-employment screening of job applicants, support for any unlawful employment practice, or any other use not authorized by this MOU. The Employer must use E-Verify for all new employees and will not verify only certain employees selectively. The Employer agrees not to use E-Verify procedures for re-verification, or for employees hired before the

date this MOU is in effect. The Employer understands that if the Employer uses E-Verify procedures for any purpose other than as authorized by this MOU, the Employer may be subject to appropriate legal action and the immediate termination of its access to SSA and DHS information pursuant to this MOU.

9. The Employer agrees to follow appropriate procedures (see Article III.B. below) regarding tentative nonconfirmations, including notifying employees of the finding, providing written referral instructions to employees, allowing employees to contest the finding, and not taking adverse action against employees if they choose to contest the finding. Further, when employees contest a tentative nonconfirmation based upon a photo non-match, the Employer is required to take affirmative steps (see Article III.B. below) to contact DHS with information necessary to resolve the challenge.

10. The Employer agrees not to take any adverse action against an employee based upon the employee's employment eligibility status while SSA or DHS is processing the verification request unless the Employer obtains knowledge (as defined in 8 C.F.R. § 274a.1(l)) that the employee is not work authorized. The Employer understands that an initial inability of the SSA or DHS automated verification to verify work authorization, a tentative nonconfirmation, or the finding of a photo non-match, does not mean, and should not be interpreted as, an indication that the employee is not work authorized. In any of the cases listed above, the employee must be provided the opportunity to contest the finding, and if he or she does so, may not be terminated or suffer any adverse employment consequences until

and unless secondary verification by SSA or DHS has been completed and a final nonconfirmation has been issued. If the employee does not choose to contest a tentative nonconfirmation or a photo non-match, then the Employer can find the employee is not work authorized and take the appropriate action.

11. The Employer agrees to comply with section 274B of the INA by not discriminating unlawfully against any individual in hiring, firing, or recruitment or referral practices because of his or her national origin or, in the case of a protected individual as defined in section 274B(a)(3) of the INA, because of his or her citizenship status. The Employer understands that such illegal practices can include selective verification or use of E-Verify, discharging or refusing to hire eligible employees because they appear or sound "foreign", and premature termination of employees based upon tentative nonconfirmations, and that any violation of the unfair immigration-related employment practices provisions of the INA could subject the Employer to civil penalties pursuant to section 274B of the INA and the termination of its participation in E-Verify. If the Employer has any questions relating to the anti-discrimination provision, it should contact OSC at 1-800-255-7688 or 1-800-237-2515 (TDD).

12. The Employer agrees to record the case verification number on the employee's Form I-9 or to print the screen containing the case verification number and attach it to the employee's Form I-9.

13. The Employer agrees that it will use the information it receives from the SSA or DHS pursuant to E-Verify and this MOU only to confirm the employment eligibility of newly-hired employees after completion of the Form I-9. The Employer

agrees that it will safeguard this information, and means of access to it (such as PINS and passwords) to ensure that it is not used for any other purpose and as necessary to protect its confidentiality, including ensuring that it is not disseminated to any person other than employees of the Employer who are authorized to perform the Employer's responsibilities under this MOU.

14. The Employer acknowledges that the information which it receives from SSA is governed by the Privacy Act (5 U.S.C. § 552a(i)(1) and (3)) and the Social Security Act (42 U.S.C. 1306(a)), and that any person who obtains this information under false pretenses or uses it for any purpose other than as provided for in this MOU may be subject to criminal penalties.

15. The Employer agrees to allow DHS and SSA, or their authorized agents or designees, to make periodic visits to the Employer for the purpose of reviewing E-Verify -related records, i.e., Forms I-9, SSA Transaction Records, and DHS verification records, which were created during the Employer's participation in the E-Verify Program. In addition, for the purpose of evaluating E-Verify, the Employer agrees to allow DHS and SSA or their authorized agents or designees, to interview it regarding its experience with E-Verify, to interview employees hired during E-Verify use concerning their experience with the pilot, and to make employment and E-Verify related records available to DHS and the SSA, or their designated agents or designees. Failure to comply with the terms of this paragraph may lead DHS to terminate the Employer's access to E-Verify.

ARTICLE III

REFERRAL OF INDIVIDUALS TO THE SSA AND THE DEPARTMENT OF HOMELAND SECURITY

A. REFERRAL TO THE SSA

1. If the Employer receives a tentative nonconfirmation issued by SSA, the Employer must print the tentative nonconfirmation notice as directed by the automated system and provide it to the employee so that the employee may determine whether he or she will contest the tentative nonconfirmation.

2. The Employer will refer employees to SSA field offices only as directed by the automated system based on a tentative nonconfumation, and only after the Employer records the case verification number, reviews the input to detect any transaction errors, and determines that the employee contests the tentative nonconfirmation. The Employer will transmit the Social Security Number to SSA for verification again if this review indicates a need to do so. The Employer will determine whether the employee contests the tentative nonconfirmation as soon as possible after the Employer receives it.

3. If the employee contests an SSA tentative nonconfirmation, the Employer will provide the employee with a referral letter and instruct the employee to visit an SSA office to resolve the discrepancy within 8 Federal Government work days. The Employer will make a second inquiry to the SSA database using E-Verify procedures on the date that is 10 Federal Government work days after the date of the referral in order to obtain confirmation, or final nonconfirmation, unless otherwise instructed by SSA or unless SSA determines that more than 10 days is necessary to resolve the tentative nonconfirmation.

4. The Employer agrees not to ask the employee to obtain a printout from the Social Security Number database (the Numident) or other written verification of the Social Security Number from the SSA.

B. REFERRAL TO THE DEPARTMENT OF HOMELAND SECURITY

1. If the Employer receives a tentative nonconfirmation issued by DHS, the Employer must print the tentative nonconfirmation notice as directed by the automated system and provide it to the employee so that the employee may determine whether he or she will contest the tentative nonconfirmation.

2. If the Employer finds a photo non-match for an alien who provides a document for which the automated system has transmitted a photo, the employer must print the photo non-match tentative nonconfirmation notice as directed by the automated system and provide it to the employee so that the employee may determine whether he or she will contest the finding.

3. The Employer agrees to refer individuals to DHS only when the employee chooses to contest a tentative nonconfirmation received from DHS automated verification process or when the Employer issues a tentative nonconfirmation based upon a photo non-match. The Employer will determine whether the employee contests the tentative nonconfirmation as soon as possible after the Employer receives it.

4. If the employee contests a tentative nonconfirmation issued by DHS, the Employer will provide the employee with a referral letter and instruct the employee to contact the Department through its toll-free hotline within 8 Federal Government work days.

5. If the employee contests a tentative nonconfirmation based upon a photo non-match, the Employer will provide the employee with a referral letter to DHS. DHS will electronically transmit the result of the referral to the Employer within 10 Federal Government work days of the referral unless it determines that more than 10 days is necessary.

6. The Employer agrees that if an employee contests a tentative nonconfirmation based upon a photo non-match, the Employer will send a copy of the employee's Form I-551 or Form I-766 to DHS for review by:

- Scanning and uploading the document, or
- Sending a photocopy of the document by an express mail account (furnished and paid for by DHS).

7. The Employer understands that if it cannot determine whether there is a photo match/non-match, the Employer is required to forward the employee's documentation to DHS by scanning and uploading, or by sending the document as described in the preceding paragraph, and resolving the case as specified by the Immigration Services Verifier at DHS who will determine the photo match or non-match.

ARTICLE IV

SERVICE PROVISIONS

The SSA and DHS will not charge the Employer for verification services performed under this MOU. The Employer is responsible for providing equipment needed to make inquiries. To access the E-Verify System, an Employer will need a personal computer with Internet access.

ARTICLE V

PARTIES

This MOU is effective upon the signature of all parties, and shall continue in effect for as long as the SSA and DHS conduct the E-Verify program unless modified in writing by the mutual consent of all parties, or terminated by any party upon 30 days prior written notice to the others. Any and all system enhancements to the E-Verify program by DHS or SSA, including but not limited to the E-Verify checking against additional data sources and instituting new verification procedures, will be covered under this MOU and will not cause the need for a supplemental MOU that outlines these changes. DHS agrees to train employers on all changes made to E-Verify through the use of mandatory refresher tutorials and updates to the E-Verify manual. Even without changes to E-Verify, the Department reserves the right to require employers to take mandatory refresher tutorials.

Termination by any party shall terminate the MOU as to all parties. The SSA or DHS may terminate this MOU without prior notice if deemed necessary because of the requirements of law or policy, or upon a determination by SSA or DHS that there has been a breach of system integrity or security by the Employer, or a failure on the part of the Employer to comply with established procedures or legal requirements. Some or all SSA and DHS responsibilities under this MOU may be performed by contractor(s), and SSA and DHS may adjust verification responsibilities between each other as they may determine.

Nothing in this MOU is intended, or should be construed, to create any right or benefit, substantive

or procedural, enforceable at law by any third party against the United States, its agencies, officers, or employees, or against the Employer, its agents, officers, or employees.

Each party shall be solely responsible for defending any claim or action against it arising out of or related to E-Verify or this MOU, whether civil or criminal, and for any liability wherefrom, including (but not limited to) any dispute between the Employer and any other person or entity regarding the applicability of Section 403(d) of IIRIRA to any action taken or allegedly taken by the Employer.

The employer understands that the fact of its participation in E-Verify is not confidential information and may be disclosed as authorized or required by law and DHS or SSA policy, including but not limited to, Congressional oversight, E-Verify publicity and media inquiries, and responses to inquiries under the Freedom of Information Act (FOIA).

The foregoing constitutes the full agreement on this subject between the SSA, DHS, and the Employer.

EXHIBIT 16

[SEAL] The White House
President
George W. Bush

For Immediate Release
Office of the Press Secretary
August 10, 2007

Fact Sheet: Improving Border Security and Immigration Within Existing Law

In Focus: Immigration

Today, Homeland Security Secretary Michael Chertoff And Commerce Secretary Carlos Gutierrez Announced A Series Of Reforms The Administration Will Pursue To Address Border Security And Immigration Challenges. The following reforms represent steps the Administration can take within the boundaries of existing law to secure our borders more effectively, improve interior and worksite enforcement, streamline existing guest worker programs, improve the current immigration system, and help new immigrants assimilate into American culture.

BORDER SECURITY

- *1. The Administration Will Continue To Strengthen Security At The Border With Additional Personnel And Infrastructure.* We are committed to implementing the following bottler security measures by December 31, 2008:
- 18,300 Border Patrol agents
- 370 miles of fencing
- 300 miles of vehicle barriers

- 105 camera and radar towers
- Three additional UAVs

We will also work to ensure that 1,700 more Border Patrol Agents and an additional UAV are added in 2009.

- *2. The Administration Will Maintain The Policy Of "Catch And Return" For Illegal Aliens Apprehended At The Border.* For years, limited detention space forced the release of many illegal border crossers from nations other than Mexico with nothing more than a Notice to Appear for a hearing before an immigration judge. Many aliens ignored these notices and instead blended into U.S. society. The Administration has ended this practice and instituted a policy of "catch and return," ensuring that all removable aliens caught trying to cross the border illegally are held until they can be removed.
    - *The Administration Will Further Increase Funding For Detention Beds So There Are Places To Detain 31,500 Illegal Aliens Until They Can Be Returned.*
    - *The Administration Will Also Press Recalcitrant Countries To Work With The United States To Repatriate Citizens Who Are In The United States Illegally.*
- *3. The Departments Of State And Homeland Security Will Strengthen Legal Efforts To Keep International Gang Members Out Of The United States.* Gangs are at the root of many U.S. crime problems today, and many of the most dangerous gangs draw significant

membership from abroad. The Federal government already denies visas to known members of certain gangs from China, the former Soviet Union, and El Salvador. Today, the President is directing the State Department and the Department of Homeland Security (DHS) to expand this list of dangerous organized gangs from other nations and to ensure that members of those gangs are barred from entry into the United States.

- *4. The Administration Will Expand Exit Requirements So Persons Who Overstay Limited-Duration Visits To The United States Can Be Identified.*
    - *By The End Of 2008, The US-VISIT Exit Requirement Will Be Underway At All U.S. Airports and Seaports*—The Department of Homeland Security will continue to explore effective and cost efficient means of establishing biometric exit requirements at and border crossings.
    - *The Administration Will Establish A New Land-Border Exit System For Guest Workers, Starting On A Pilot Basis.* This will help ensure that temporary workers in the country now follow the mandate to leave when their work authorization expires.
- *5. The Administration Will Require All Travelers To Our Ports Of Entry To Use Passports Or Other Similar Secure Documents.* Since January 2007, air travelers have been required to carry a passport for entry into the United States. Because of passport processing backlogs, a temporary accommodation has

been made for U.S. citizens traveling in the Western Hemisphere, which will be phased out. Starting January 31, 2008, DHS will phase in a requirement for passports or other secure documents for sea and land ports of entry.

- *6. Beginning This Fall, The Secretary Of Homeland Security Will Deliver Regular "State Of The Border" Reports.* These reports will keep the American people informed of the Federal Government's progress in securing the border and hold the Administration accountable for continuing improvement.

INTERIOR ENFORCEMENT

- *7. The Administration Is Training Hundreds Of State And Local Law Enforcement Officers To Address Illegal Immigration in Their Communities.* The Administration is maintaining the 287(g) program and expanding other measures that help State and local law officials. These measures include a broad array of enforcement tools, such as formal task forces, greater use of the ICE Law Enforcement Support Center, delegated border search and seizure authority under Title 19, and enhanced partnerships to address location-specific threats, such as gangs.

- *8. By This Fail, U.S. Immigration And Customs Enforcement' Teams Devoted To Removing Fugitive Aliens Will Have Been Quintupled In Less Than Three Years.* There were 15 seven-member Fugitive Operations Teams in 2005. As of this week there are 68; there will be 75 by the end of September.

- *9. The Justice Department Will Initiate Regulatory Action To Close The "Voluntary Departure" Loophole Manipulated By Many Illegal Immigrants.* Illegal immigrants who settle their cases by agreeing to voluntarily depart sometimes then gain extra time inside the United States by filing a procedural motion to reopen the case. New regulations will clarify that filing such a motion will terminate the voluntary departure status and make the alien subject to the order of removal. They will also set a presumptive $3,000 civil penalty for failing to comply with a voluntary departure agreement.

WORKSITE ENFORCEMENT

- *10. Today, The Department Of Homeland Security Issued A "No-Match" Regulation That Will Help Employers Ensure Their Workers Are Legal And Help The Government Identify And Crack Down On Employers Who Knowingly Hire Illegal Workers.* In cases in which an employer has a significant number of employees with inaccurate personal identity information, the Social Security Administration will send the employer a "No-Match" letter. The regulation clarifies that employers may be held liable if they ignore the "No Match" problems by failing to take specified steps within 90 days of receiving the letter.

- *11. In The Coming Months, The Administration Will Publish A Regulation That Will Reduce The Number Of Documents That Employers Must Accept To Confirm The identity And Work Eligibility Of Their Employees.* Presently, no fewer than 29

categories of documents can be used to establish identity and work eligibility. Employers have little capacity to verify the authenticity of these documents, and the sheer quantity of accepted documents is an invitation to fraud. This regulation will reduce unlawful employment by weeding out insecure documents now used often for identity fraud.

- *12. As A Civil Counterpart To The Administration's Strategy Of Using Criminal Investigations To Deter Illegal Employment, The Department Of Homeland Security Will Raise The Civil Fines Imposed On Employers Who Knowingly Hire Illegal Immigrants By Approximately 25 Percent.* Efforts to secure the border will fail unless the "magnet" that attracts illegals is turned off. Unfortunately, the fines for relying on illegal workers are so modest that some companies treat them as little more than a cost of doing business. DHS will use existing authority to update civil fines for inflation in order to boost fines by about 25 percent as much as is allowed under current law.

- *13. The Administration Will Continue To Expand Criminal Investigations Against Employers Who Knowingly Hire Large Numbers Of Illegal Aliens.* Arrests by U.S. Immigration and Customs Enforcement for criminal violations have increased from 24 in FY 1999 to a record 716 in FY 2006. There have been 742 criminal arrests since the beginning of FY 2007 (through July 31), and there is anecdotal evidence that companies are

taking notice and adjusting their business practices to follow the law.

- *14. The Administration Will Commence a Rulemaking Process To Require All Federal Contractors And Vendors To Use E-Verify, The Federal Electronic Employment Verification System, To Ensure That Their Employees Are Authorized To Work In The United States.* The Federal government ought to lead by example. As there are more than 200,000 companies doing Federal business, this will significantly expand use of E-Verify, and make it more difficult for illegal immigrants to obtain jobs through fraud.

- *15. The Administration Will Help States Make Greater Use Of E-Verify.* Some States already mandate the use of E-Verify by some or all of their hiring agencies, and other States are considering similar requirements. The Administration will assist such efforts through outreach and offers of technical assistance.

- *16. The Administration Will Bolster E-Verify By Expanding The Data Sources It Can Check.* This will make it easier to catch individuals who commit identity theft. New sources of data will include cross-checks of visa and passport information.

- *17. The Administration Will Seek Voluntary State Partners Willing To Share Their Department Of Motor Vehicles Photos And Records With E-Verify.* Agreements to allow E-Verify access to the repository of photographs in state DMV databases will help prevent illegal immigrants from using fraudulent

driver's licenses to obtain employment. Such agreements will also lay the groundwork for further expansion of the electronic employment eligibility verification system.

STREAMLINING EXISTING GUEST-WORKER PROGRAMS

- *18. The Department Of Labor (DOL) Will Reform The H-2A Agricultural Seasonal Worker Program.* No sector of the American economy requires a legal flow of foreign workers more than agriculture, which has begun to experience severe labor shortages as our Southern border has tightened. The President has therefore directed DOL to review the regulations implementing the H-2A program and to institute changes that will provide farmers with an orderly and timely flow of legal workers, while protecting the rights of laborers.

- *19. The Department Of Labor Will Issue Regulations Streamlining The H-2B Program For Non-Agricultural Seasonal Workers.* Because businesses in seasonal industries such as landscaping and hospitality frequently have a difficult time locating temporary workers, the H-2B program has proven quite popular. Some employers report significant processing delays, however. DOL's proposed rule will speed processing by moving from a government-certified system to an employer-attestation system akin to the PERM system that has reduced backlogs in other areas.

- *20. The Department Of Homeland Security Will Extend The Visa Term For Professional Workers From Canada And Mexico To Attract More Of These Talented Workers To The United States.* The United States must compete for foreign professional workers, and those who elect to lend their talents to the U.S. economy should be welcomed with open arms, not given a bureaucratic runaround. Yet the roughly 65,000 workers who enter the United States each year on the TN visa must go to the trouble of renewing their visa every year. This regulation will extend the TN visa duration to three years—the same term as other popular professional visas.

- *21. The Department Of Homeland Security And The Department Of Labor Will Study And Report On Potential Administrative Reforms To Visa Programs For Highly Skilled Workers.*

IMPROVING EXISTING IMMIGRATION

- *22. The Administration Will Reform And Expedite Background Checks For Immigration.* Current mechanisms for conducting immigration background checks are backed up, slowing processing times and endangering national security. The Administration is investing substantial new funds to address the backlog, and the FBI and USCIS are working together on a variety of projects designed to streamline existing processes so as to reduce waiting times without sacrificing security.

- *23. The President Is Directing The Department Of Homeland Security And The Social Security Administration To Study The Technical And*

Recordkeeping Reforms Necessary To Guarantee That Illegal Aliens Do Not Earn Credit In Our Social Security System For Illegal Work. Currently, aliens who make Social Security payments while working here legally can continue to accrue credits even if they overstay their visa. Improved data-sharing can lay the foundation for eventual Congressional action to eliminate this practice (which proved an obstacle to comprehensive reform). The relevant agencies are ordered to report to the President with a detailed plan for eliminating the problem.

ASSIMILATION

- *24. The Office Of Citizenship Will Announce A Revised Naturalization Test In September 2007.* The new test will emphasize fundamental concepts of American democracy, basic U.S. history, and the rights and responsibilities of citizenship. It will inculcate the basic values we share as Americans, and encourage civic knowledge and patriotism among prospective citizens.
    - *The New Standardized Test Will Ensure Fairness By Eliminating Current Wide Variations In The Quality Of Testing Between Regional Offices.*
- *25. The Office Of Citizenship Will Provide Additional Training For Volunteers And Adult Educators Who Lead immigrants Through The Naturalization Process.* In October 2007, the Office of Citizenship will introduce a web-based training program that covers U.S. government, civics education, and the natura-

lization process. To complement these on-line materials, USCIS will convene eight regional training conferences, beginning in October 2007, to improve the ability of citizenship instructors and volunteers to teach American history, civics, and the naturalization process to immigrant students. An on-line training module will also be available by the end of the year.

- *26. The Department Of Education Will Launch A Free, Web-Based Portal To Help Immigrants Learn English, And Expand This Model Over Time.* Knowledge of English is the most important component of assimilation. An investment in tools to help new Americans learn English will be repaid many times over in the contributions these immigrants make to our political discourse, economy, and society.

[SEAL] Homeland Security

Remarks By Homeland Security Secretary Michael Chertoff And Commerce Secretary Gutierrez At A Press Conference On Border Security And Administrative Immigration Reforms

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Secretary Chertoff: As you can see, I'm here with Secretary Carlos Gutierrez of the Department of Commerce. I want to thank you all for coming. As you doubtless know, Secretary Gutierrez and I spent a good deal of time over the last several months working with Congress to develop a workable solution to the challenge of immigration in this country.

We're obviously disappointed in the fact, as is the President, that Congress has not chosen to act on our comprehensive solution. The Senate bill that we worked on would have given us important new tools and resources to strengthen border security, increase and toughen interior enforcement, and help meet the needs of our growing economy through a temporary worker program. Our hope is that the key elements of the Senate bill will see the light of day at some point. But until Congress chooses to act, we're going to be taking some energetic steps of our own.

Today the administration is announcing a package of initiatives that will significantly strengthen our hand with respect to immigration enforcement, including interior enforcement, and will also strengthen many other aspects of our immigration system.

I'd like to talk about two key elements of our interior enforcement approach, and Secretary Gutierrez will discuss some of the steps we're taking with respect to visas and temporary workers.

We all know that a critical part of immigration enforcement is effective interior and worksite enforcement. The reason for that is because the magnet that brings most economic migrants into this country is work. And if we have worksite enforcement directed at illegal employment, we strike at that magnet.

Now, over the last year, we've stepped up our efforts quite considerably to hold employers accountable when they willfully break the law by hiring illegal workers. Indeed, Immigration and Customs Enforcement has made more than 3,200 administrative arrests to date this fiscal year.

Last fiscal year, we brought 716 criminal cases. This fiscal year, which is still not complete, we've already gotten 742 criminal arrests in worksite enforcement cases. So we are continuing to move ahead aggressively, and each year we have dramatically increased the numbers of these cases.

We're going to continue to clamp down on employers who knowingly and willfully violate the laws. But at the same time, we want to make sure that employers who do want to do the right thing have effective tools and clear guidance so they can maintain a stable, legal work force.

The first element of this is something that we call E-Verify. As many of you know, we currently have a voluntary program that allows employers to quickly and reliably check the work status of their employees online, using a computer-based tool. It's called the

Employment Eligibility Verification System. It also has been known as Basic Pilot. What the system does is it compares information taken from the I-9 employment verification form, which establishes a person's work eligibility, and matches it against more than 425 million records held in the Social Security database. And it also checks against 60 million records held in DHS's immigration databases.

I've seen this system work. It's quick and it's easy to use. More than 19,000 employers across the country rely on it, it has no charge, and it's available in all the states. And what it simply does is it tells you whether the particular document matches the Social Security number and whether both of those are genuine when compared to these databases.

Because of the success of this system and its ability to take the guesswork, or some of the guesswork out of employment document review we're going to be strengthening and expanding the system giving it a new name E-Verify.

Now, let me make it clear that under the Senate bill, which did not pass, we would have actually made enrollment in E-Verify mandatory for employers. And although voluntary participation has been strong under the existing state of the law, we cannot mandate all employers to use this system. But we will want to encourage as many companies as possible to use E-Verify, and we're going to start with the federal government.

We want to lead by example. For this reason, today we are announcing that the administration has initiated a rulemaking process to require new federal contractors to enroll in E-Verify. In order to do this, we're going to amend the federal acquisition regula-

tions, which are the rules that basically govern federal contracting, and we're going to require that federal contractors who receive new federal contracts use the E-Verify system to check the employment eligibility of the contractor work force that will work on those contracts. In other words, using E-Verify will become a contract performance requirement once the regulatory process is complete, which will probably take several months. And once the regulation is effective, if a federal contractor fails to use the system for employers who are working on federal contracts, their contract will be subject to being terminated for non-performance.

Even as we wait to get through the regulatory process, we're going to take some immediate steps here at the Department of Homeland Security to modify the Homeland Security Acquisition Manual to encourage vendor participation in the E-Verify system.

What we're going to do is we're going to designate a vendor's participation in the system as a positive consideration to be part of the mix in evaluating DHS procurements. In other words, you're going to get points, positive points, for participating in the system if you want to get a significant DHS contract. We're doing it, again, to encourage companies who want to do business with DHS, to demonstrate that they have a legal work force. Enrolling in E-Verify will help to provide that assurance.

We also are trying to take advantage of some of the recent steps we've been able to put into effect to strengthen and enhance the value of E-Verify as a tool. E-Verify now has the capability—and we're going to expand this across the system—to use an enhanced photographic capability that will allow employers to

check the photograph on some of the documents which are presented in the I-9 process against the original of the document in the database. So, for example, if you have an employee who is presenting an official employment authorization document, or who is presenting a green card, a permanent residence card, the employer who participates in this enhanced photo tool will be able to see a duplicate, an exact duplicate, of the photograph being presented on the—by the person who is seeking employment and measure that against an original version of the photograph in the database at DHS. This way, you'll be able to determine that the person hasn't phonied up the document or substituted a phony photograph for a real photograph. Its again an effort to make this tool as robust as possible.

It will also, by the way, help attack the problem of identity fraud. And we want to continue to work not only with our partners in other government agencies, but with the states, to roll this photographic comparison capability across a number of different databases, including passports and driver's licenses in states that are willing to participate.

Now, another major component of interior enforcement is accountability. Employers have to be held accountable if they are given clear notice of the fact that they may be hiring illegal aliens. To this end, we're today issuing a final regulation, which will be effective in 30 days, that outlines the specific steps an employer should take if that employer receives a no-match letter from the Social Security Administration that informs the employer that there is an employee whose name and Social Security number do not match government records.

Now, a lot of times these matches are the result of an honest clerical mistake, or something like a change of status when somebody gets married and they don't update their records. But in many cases, the failure to have a match with records is a good indicator that the employee has provided a phony Social Security number to the employer or, perhaps, that the employer himself has provided a fake number. We have seen instances where employers have submitted the same Social Security number for multiple employees.

How big is the problem? Out of 250 million wage reports the Social Security Administration receives every year, as many as four percent show no matches. Now, many employers take steps to resolve these discrepancies, but some of them do not, and some of them have hidden behind the idea that there is confusion in the rules. So what this regulation does is it sets forth a clear choice. There is a right way to react to a no-match letter, which, if followed in good faith, will give the employer a safe harbor against liability, and there's also a wrong way to respond, which is to ignore it And the regulation makes clear that if you ignore a no-match letter you are putting yourself in a position where that fact will be used against you if the time comes to assess liability.

So let me lay out what the path is for those people who receive no-match letters. Within 30 days of getting a no-match letter, businesses should check their records to make sure the discrepancy isn't simply a clerical or administrative error, somebody mistyped a named [sic] or mistyped a number.

If that is not the source of the problem, the employer then has to bring the employee in and ask the employee to confirm the accuracy of the

information and, if necessary, contact the Social Security Administration to correct the problem. As I say, in some cases, that will be an update to a marital status or something of that sort, and the problem will be corrected. And by the way, the good news there is that it will eliminate a problem down the line if the employee ever seeks to actually receive some of their rightful Social Security benefits.

But if the problem cannot be resolved within 90 days, then either the employee has to come forth with some new reliable evidence that they are authorized to work, like a passport, or if work eligibility cannot be confirmed after 90 days, the company is going to have to terminate the employee.

In other words, receiving a no-match letter puts the company on notice that there is a discrepancy or a problem with the records pertaining to a particular employee. What the company may not do is simply ignore the problem. And if the company does nothing to resolve the problem or doesn't act in good faith, that company can be held liable for employing an unauthorized worker and could face stiff penalties or sanctions.

At the same time, the regulation does provide a safe harbor for employers who follow the guidance and perform due diligence so that they do try to comply with their legal obligations. We don't want to punish people who try to do the right thing. And this regulation lays out a clear path to doing the right thing, which will afford protection for employers who are following the law.

Ultimately, these guidelines will make it more difficult for illegal aliens to use a fraudulent Social Security number to get a job, and It will help employers take appropriate action to protect themselves.

Of course, because Congress didn't pass the comprehensive immigration measure, we don't have all the tools we'd like to have, but we're going to continue to work closely with Congress to improve our ability to share no-match data with other government agencies, including Immigration and Customs Enforcement, so we can more effectively target our enforcement efforts.

The message we are conveying today is pretty simple: We are serious about immigration enforcement. We have been serious over the last few years about immigration enforcement. Last May, when the President announced a multi-part strategy to deal with this problem, we began flowing resources and efforts not only at the border but at the interior. We have seen some dramatic results. Among the results, have been a noticeable downturn in the people that we are detecting crossing the border, some very good anecdotal evidence that suggests that people are beginning to give up on trying to cross the border. And there was a recent study in the paper yesterday that indicated that remittances going overseas are going down, which is another indicator of the fact that we may be seeing some lessened illegal activity.

At the same time, there's going to be an economic consequence to tough law enforcement, and I think that's the second part of the challenge that we have that Secretary Gutierrez is going to talk about.

Secretary Gutierrez: Thank you, Secretary Chertoff, and thank you for your continued leadership. As we've often said, we believe immigration is the social issue of our time. While we had hoped to get comprehensive reform passed on Capitol Hill, President Bush remains absolutely committed to addressing this issue. We will not sit idly by as the situation

worsens. We will use every available tool to provide America's farmers, ranchers and small businesses with a legal work force to stay in business and keep our economy strong.

Today we are announcing a package of administrative reforms that sharpen the tools we have to protect the American people and make our immigration system even more workable. This package of reforms, first and foremost, deals with security, as Secretary Chertoff has outlined. That is the utmost priority of the federal government, and security must come first.

But the economic security of our nation is also essential. We do not have the workers our economy needs to keep growing each year. The demographics simply are not on our side. While Congress has not passed a new temporary worker program, we do have existing programs on the books that help provide workers in industries like agriculture, landscaping, hospitality and lodging.

During the legislative process, we heard from many people involved, especially farmers and small business owners, that these programs could be made easier to use while protecting the rights of workers. That's why the Department of Labor will be reviewing ways to make the H-2A Agricultural Seasonal Worker Program more workable, while protecting the rights of workers. The Department of Labor will also issue regulations streamlining the H-2B program for non-agricultural seasonal employees who work in industries ranging from hospitality to crab-picking. Finally, the administration will study possible administrative reforms to the programs for temporary high-skilled workers.

With historically low 4.6 percent unemployment, it is clear that there are jobs that Americans aren't willing to do or that Americans are not available to do, and we need to acknowledge this reality. That means looking at ways to improve these vital programs so they are workable, realistic, and help meet the demands of our economy.

This is just one piece of a much larger puzzle. Ultimately—ultimately, Congress will have to pass comprehensive immigration reform. Without reform, we're going to end up with a patchwork of laws nationwide. As of July the 2nd, more than 1,400 immigration bills had been submitted by state lawmakers, and since January, 170 of those bills have become laws. Without reform, we will also see many of our agricultural products coming from overseas. And without reform, small businesses and farmers are going to go out of business. This issue is not going to go away; Congress needs to act.

We will enforce the laws on the books, address what we can through administrative means, and continue to highlight the need for a comprehensive immigration reform that is essential for our nation's future security and prosperity.

Thank you. Now I'll be happy to take Questions.

Question: Secretary Chertoff, could you respond first to employers' concerns that the no-match letter is going to cause huge havoc? And then could both of you also speak to the larger goal behind all these rules and regulations? Are you trying to force Congress's hand? Are you trying to squeeze employers? What's the larger purpose?

Secretary Chertoff: Well, first of all, the havoc—the only havoc that will be created will be to the

extent that people are employing illegals. Obviously those illegals are likely to end up leaving the work force. That may reflect the fact that illegals do perform a lot of work in some sectors of the economy in this country. And ultimately, the solution for the problem of filling that gap is a solution that requires congressional action, in terms of temporary work requirements, in some way to meet these labor needs.

Let me be very clear about what we're doing here. I have said with absolute consistency, from before we started the immigration reform effort earlier this year, that I was determined to enforce the laws of this country to the utmost of my vigor. And we've done that since we've—at least since I've been Secretary. We had hoped that immigration reform on a comprehensive basis would give us a much wider set of tools; we don't have that We still think Congress can act on it. But until the laws change, we are enforcing the laws as they are to the utmost of our ability, using every tool that we have in the toolbox, and we're going to sharpen some of those tools.

So this is not a reaction to anything. It is simply the discharge of certainly my oath of office, which requires me to execute the laws as they are.

Secretary Gutierrez: I'd just add to that, Mr. Secretary, the point about—we wanted comprehensive immigration reform, and that was a set of new laws that would help on the security and on the economic side. We weren't able to achieve that. But we still have an obligation to try to solve these problems.

So we're going to do everything we can that is allowed by the law on an administrative basis, by the executive branch. And that includes security, but it also includes making these temporary worker

programs workable. Today they're not being used because they are not workable. So we'll analyze them, review them, the Department of Labor will do that. And we'll see if we can make them more workable to help business have a legal path to hiring workers and have a legal workforce.

Question: Your message to Congress seems quite clear. What is your message to employers, especially in agriculture? Are you saying, you guys just aren't trying hard enough to get legal workers, or good luck? Where are they going to come from?

Secretary Chertoff: Well, I think part of it is what Secretary Gutierrez said. We have an obligation to try to make the existing programs work as efficiently as possible. I do think there's a larger issue here as to whether there is a sufficient work force of American citizens or people who are authorized to work to do this kind of agricultural work. And it creates a real dilemma for the agricultural sector, and we appreciate that. And I don't think this is a surprise. We have said this repeatedly over the last year.

Nevertheless, this is a circumstance in which we find ourselves. We're going to do the very best we can to make the legal channel as appealing as possible. But at the end of the day, the enforcement of the law is going to have some consequences. The one thing I think we've tried to do from the very beginning is to be really up front and transparent about what the consequences of these decisions are. We don't get a vote in Congress. We can't make Congress pass it. But we can be very sure that we let Congress understand the consequences of the choices that Congress makes. We do the very best we can to mitigate the harm, but in the end, we have to follow the law.

Question: Well, isn't it true, though, that you're basically trying to turn up the heat on Congress by hoping that employers who will be squeezed here will get to their members of Congress—

Secretary Gutierrez: We heard from employers consistently that they did not believe they had the tools and that they didn't have the law to be able to enforce what we're asking them to enforce. We had that in the comprehensive immigration reform package. What we're going to do with our executive branch authority, the President's authority, is to give employers tools to the extent that we can. But this is all about giving them tools that they repeatedly told us they did not have.

Secretary Chertoff: Yes, Pete, let me just say one other thing, because I do think it's very important. There is—and again, I'd go back to things I said before we even started this year—there is a credibility problem the government has built up over 30 years on this issue, because we've had 30 years—and particularly after the 1986 act, there was real lack of vigor. And there's some cynicism and certainly skepticism about whether the government has ever really been serious about enforcement.

I think we've done a lot in the last couple years to show we are serious about it. And so this is not an effort to punish Congress. This is an effort to execute the law and also to keep faith with the American public. Now, we may tell the public we think we need to do some additional things, but I think job one for the federal government is always to say to the people of this country, we will discharge the obligations that you have placed upon us, particularly as it relates to issues of sovereignty and security at our nation's borders.

Question: Mr. Secretary, could you tell us how you could actually enforce all of these new rules? It's well and good to have the match letter rules and to have the verification on Basic Pilot, but if you don't have enough people to go out and inspect the workplaces and do that, isn't it a hollow requirement?

Secretary Chertoff: Well, of course, part of what are committed to do here is to raise the number of people we have to do enforcement, raise the number of people we put at the border. And Congress, of course, is going to have to give us the funding to do this.

Now, as with any other enforcement action, like enforcing the narcotics laws, we don't necessarily catch everybody who breaks the law. But we're going to catch—not only are we going to catch a larger percentage, but with these tools, once we do catch somebody, there's going to be no place to hide. If we get somebody who's gotten no-match letters—and we do get a lot of tips, we get a lot of informants; it's amazing the number of people who come forward and tell us about illegality in the workplace—and we go in, we see that someone's gotten no-match letters and they've simply put them in the wastebasket, that's going to be awfully hard for them to explain to a jury when the time comes for their trial.

So these tools will help us enforce the law. But I also have to go back to the fact that we had asked Congress to give us clear authority to have information sharing with the Social Security Administration so that they could identify those companies which have the highest percentage of no-match letters. Congress didn't give us that; we've asked for that for two years. That would certainly be a major step forward in allowing us to target the worst of the worst, the worst offenders.

Question: Well, if I can just follow up. Does this mean that there will be no more enforcers?

Secretary Chertoff: No, we're bringing more enforcers on. We've added more. We're asking Congress in the current budget to give us more money for enforcement, more beds, more agents. I think if you look at the sheet we've put out, we're committed ultimately to having over 31,000 beds, bringing more border agents and ICE agents on. There will never, of course, be an agent to investigate every single violation across the country, just as there will never be enough narcotics enforcers to investigate every time somebody sells a small amount of drugs. But experience shows if you're smart and how you prioritize, you can have a major impact

And let me just say one thing. This is an area where experience shows deterrence really works marvelously. We are starting to see employers on their own beginning to check their work force because they see what's coming and they don't want to take the risk of liability. So I think it's like the tax laws. We rely on a lot of self-policing with our tax code. And I think this is an area where we're going to get a lot of that self policing as well.

Question: Mr. Secretary, when are these measures going to be actually implemented? I know this is a final rule, but is there a time—is there a timeline, a waiting period?

Secretary Chertoff: The no-match regulation will be effective in 30 days, and then what will happen is the Social Security Administration will begin to send the letters out. They will not send all of them out at once, they'll probably send about 15,000 out a week, over a period of probably about eight to 10 weeks. So it will flow over a period of time.

The new contractor regulation actually has to go through a regulatory process. That's going to be a few months. But we at Homeland Security are going to put the—what I call the positive point element in as quickly as we can.

Question: Mr. Secretary, the AFL-CIO is saying that they're afraid that legal immigrants may suffer discrimination because of this. And the Chamber of Commerce is saying we're afraid businesses are going to get sued because of that; they're both talking about challenging these regulations in court. Your reaction to that?

Secretary Chertoff: This is really easy. When you get the letter, you have to apply the rule evenhandedly across your entire workforce. Discrimination is not permitted. It is not hard to understand what the rule is. The rule is, you don't make a distinction in how you apply the rule depending on a person's last name or their appearance. Any employer who doesn't understand how to apply something in a neutral fashion has probably already been sued hundreds of times.

So this is an effort—some people are making this a lot more complicated than it is. We have all kinds of requirements under our legal system for checking identification and checking records, and it's always the same principle—neutral, evenhanded, based on your—no discrimination based on your ethnic background. I think there's not going to be any difficulty in understanding that, and I think that people who violate that rule and use it as a pretext will face some—

Question: Mr, Secretary, what do you think of the—challenge you in court—

Secretary Chertoff: People challenge things in court all the time. We'll defend it vigorous—

Question: You're comfortable with it, that you've got footing?

Secretary Chertoff: Yes, very comfortable, yes.

Secretary Gutierrez: Businesses have understood for a long time, we have clear anti-discrimination laws on the books. Part of enforcing the law is also enforcing our anti-discrimination laws, And we'll be just as vigilant about that as all the other things we've talked about.

Question: How about the likelihood here that you're going to drive a lot of employers and employees underground, and employers will stop filing I-9s and will stop withholding taxes?

Secretary Chertoff: Well, that's actually—an employer who does that is making a deliberate decision to compound their legal difficulties by committing tax crimes as well as immigration crimes. I think most employers want to follow the law. I think if you give them clear guidance and a way to do it, they will do it. Obviously, there are employers who deliberately violate the law, and we will come down on them like a ton of bricks, as we has been doing, and that means felonies, and not just administrative slaps on the wrist.

Question: By law, Social Security cannot tell you who they send a match letter to. And two, are you going to involve state and local authorities in this kind of enforcement of employers?

Secretary Chertoff: Well, first of all, I don't necessarily agree that by law Social Security can't give us some information about where to target, based on

number of no-match letters. That's a legal issue we are currently addressing, although I will agree that Congress—we have asked Congress to make it clear that this kind of sharing can take place, and they have not yet stepped up to the plate.

In terms of state and locals, we have a program where we do train state and locals in terms of their learning how to do things like deportation or helping us enforce immigration laws. Its optional, it's not mandatory. And of course any communities that want to participate in the program, we will welcome to participate in the program.

Question: Mr. Secretary, it appears that a lot of what you're doing is already regulatory authority that you have, that you can do without congressional legislation. I'm wondering why you're doing it now. Why didn't you do it before? Because if that confidence wasn't there with America, it could have helped get your bill through (inaudible) through Congress.

Secretary Chertoff: What we're doing now is what I would say is—these measures are imperfect. These are tools which are not the newest tools and the best tools we could use. We looked at these programs late last year, early this year, and we thought, you know, this is kind of a half measure, wouldn't it be better to get the full measure and the sharpest, newest tolls if Congress passes them and gives it to us.

Time has run out. So now we're going to go back to the old tools, and we're going to sharpen them up as best we can I'm not going to tell you that it's as good as what we were looking to get out of Congress, but given that I think, for the time being, we can't assume Congress is going to give us the new tools,

we're going to have rehabilitate the old tools and do the best we can.

Question: When you discuss additional funding for detention and some of the other things, is that money that came —that you're expecting to come through, or that has already come through, or you're shifting money?

Secretary Chertoff: The President's budget request for '08—of course it's still before Congress—has sought a substantial funding for border enforcement and related activities, including beds, agents, technology, fencing, things of that sort. There are now—the appropriations process is underway. There are measures that are considering how much money to fund us. I don't want to start negotiating conference here in front of the press, but its obviously important that Congress give us the kind of funding we need to do the job, and of course in subsequent years, as well.

Question: Can you elaborate a little more on the punishment—Secretary Chertoff—for employers who ignore the no-match letters? How big might the fines be, for instance?

Secretary Chertoff: Well, we have a current set of fines which I think range up to $2,200 per employer for first offense, and then it goes up for second and third offense. We're going to try, by the way, to use our existing authority to raise those fines somewhat.

But here's what the real hammer is: If you went back six, seven, eight years ago, you saw a lot of administrative action, not much criminal action. We have totally turned that around now. Now, if you look at two years ago we had about 125, 130 criminal cases. Last year we had 716. This year we're up to

742. That's felony cases. In many instances that's substantial jail time if you're convicted, forfeitures in some cases, fines, and other penalties.

So I'm not saying that every time you flub a no-match letter you're going to go to jail, but I'm saying if it turns out that we have systemic violations of the law, willful violations of the law that meet the criminal standard, then employers who commit those kinds of crimes are going to be facing criminal prosecutions, and we're going to continue to push forward on that front.

Question: Many farmers say that by the time they get a no-match letter, these people they've hired have picked their crop and they're gone, and that this isn't going to work. (Inaudible.)

Secretary Gutierrez: Part of what we want to look at is the agricultural temporary workers program. We know it's very cumbersome. It doesn't lend itself to be used in an industry where you have perishable products, and where the permits take too long. So we want to go back, review that, and make those systems more workable. But we've got farm organizations calling us today, saying, we need people to help us with our grapes, and we don't have them. That's the kind of thing that we have to address, and we'll do that by making the current programs more workable.

Question: But won't this be disruptive to agriculture? How disruptive do you think it's going to be?

Secretary Chertoff: I think it's—this issue about disruption to agriculture we heard last year, because even putting aside no-match letters, just our increased work at the border was actually causing a drop in the number of workers coming across,

because, frankly, we're making it harder for illegals to come across. That's why we were trying to get a comprehensive solution here.

Let me come back to one thing, just to make sure I've put it in perspective, on the issue of the no-match letters. This is what I call the rule of reasoned principle. We're not looking to punish people for honest mistakes, clerical errors, or imperfections in process. This rule is designed to create a safe harbor for those who act in good faith, even if they make mistakes.

But when we talk about people who deliberately violate the law—and I'm not talking about just not handling the no-match letter right, I mean people who willfully and consciously hire illegals, knowing that they're doing it, and knowing that they're committing crimes in order to do it, including identity theft—those are the people we're going to be targeting for criminal sanctions. The person who does their best, in good faith, has nothing to fear from this. This should be welcome to them, because we're giving them clear guidance on a safe harbor.

But the person who—and we've seen this in cases—systematically goes out to provide phony documentation or to tell people how they can lie on their records in order to have work here when they're out of status, that's the person who does have to fear vigorous enforcement on the criminal side.

EXHIBIT 19

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News Release

FOR IMMEDIATE RELEASE
September 20, 2007

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Thomas and Arpaio to Enforce Employer Sanctions Law

Partnership Forged for Investigation of Possible Employer Violations

The County Attorney's Office today announced that it has entered into an agreement with the Sheriff's Office to jointly investigate possible violations of Arizona's new employer sanctions law. The new employer sanctions law (Arizona. Revised Statute Section. 23-212), which goes into effect January 1, 2008, authorizes the county attorney to seek suspension and, ultimately, revocation of the business license of an employer who knowingly or intentionally hires an illegal immigrant.

At a press conference today, County Attorney Andrew Thomas and Sheriff Joe Arpaio signed an intergovermental agreement between their two offices that establishes this partnership. Both the Sheriff's Office and the County Attorney's Office will field complaints from citizens regarding suspected violations of the employer sanctions law.

Complaints may come from phone calls, emails or regular mail. Sheriff's deputies will investigate. Prosecutors in the County Attorney's Office will analyze the cases investigated and determine if there is sufficient evidence to go to court and seek to suspend or revoke the business license of the employer.

Maricopa County has beat granted a budget of $1.4 million to help enforce this law, which designates county attorneys as the enforcement agencies. Under the agreement between the County Attorney's Office and the Sheriff's Office, up to $1 million from that find may be spent in help fund the sheriff's enforcement efforts.

"In seeking a partner for enforcing Arizona's new employer sanctions law, I found the choice was clear," said County Attorney Andrew Thomas. "Sheriff Arpaio and the Maricopa County Sheriff's Office have a proven track record of enforcing our immigration laws and not caving in to political correctness."

Thomas added, "Honest businesses owners who play by the rules and make an innocent mistake have nothing to fear from us. On the other hand, employers who knowingly or intentionally hire illegal immigrants are right to be worried."

"I appreciate the request by County Attorney Andrew Thomas to assist him in enforcing the new

civil employer sanction law," said Sheriff Arpaio. "The Sheriff's Office specialized Triple I Unit (Illegal Immigration Interdiction) including 160 ICE trained Sheriff's officers will be a great benefit in enforcing this new law."

EXHIBIT 20

United States General Accounting Office

Testimony

GAO

[Barcode]
141005

For Release on Delivery Expected at 10:30 a.m. EST Friday March 30, 1990

IMMIGRATION REFORM: Employer Sanctions and the Question of Discrimination

Statement of
Charles A. Bowsher
Comptroller General
of the United States

Before the
Committee on the Judiciary
United States Senate

[SEAL]

Mr. Chairman and Members of the Committee:

We are pleased to be here today to highlight the key issues noted in our March 29 report on the Immigration Reform and Control Act of 1986 (IRCA) and the question of discrimination.

The act requires employers to verify the employment eligibility of workers. It imposes civil and criminal penalties (sanctions) against employers who knowingly hire unauthorized workers. The act also requires us to issue three annual reports to Congress for the purpose of determining whether IRCA's employer verification and sanctions section has (1) created an unnecessary burden on employers, (2) been carried out satisfactorily, and (3) resulted in a pattern of discrimination against eligible workers. We are also to determine whether frivolous discrimination complaints have been filed under IRCA's anti-discrimination section to harass employers.

We found that there has been widespread discrimination. But was there discrimination as a result of IRCA. That is the key question Congress directed us to answer. Our answer is yes.

Whether discrimination resulted from the law is difficult to prove or disprove. First, there is an absence of a sensitive pre-IRCA measure of discrimination. Further, there is no comparison group not subject to IRCA. Recognizing these limitations, we used the best available evidence to meet our congressional mandate.

For our third report, we (1) reviewed federal agency implementation of IRCA, (2) reviewed discrimination complaints filed with federal agencies and data from groups representing aliens, and (3) used additional methods to obtain data on IRCA'S

effects. These methodologies included a statistically valid survey of over 9,400 of the Nation's employers, which projects to a universe of about 4.6 million employers. In collaboration with the Urban Institute, we also did a "hiring audit" in which pairs of persons matched closely on job qualifications applied for jobs with 360 employers in two cities. One member of each pair was a "foreign-appearing, foreign-sounding" Hispanic and the other was an Anglo with no foreign accent.

ILLEGAL IMMIGRATION BEING REDUCED; LAW NOT AN UNNECESSARY BURDEN

Our criteria for determining if the implementation of the sanctions section has caused an "unnecessary" regulatory burden on employers were based on whether the law's objectives were realized. We found that the burden of applying the law's verification requirements was not "unnecessary" because the law has apparently reduced illegal immigration and employment, as Congress envisioned. While not conclusive, nearly all available data suggests the law's objectives have been at least partially realized. For example,

—a statistical study by the Urban Institute concluded that the law had slowed illegal immigration,

—two surveys in Mexico found that people believe it is now harder to find worn in the United States, and

—about 16 percent of aliens apprehended during employer sanction investigations during August and September 1989 reported difficulty finding a job because of the law's verification system.

INS AND LABOR HAVE MET THEIR MINIMUM RESPONSIBILITIES UNDER THE LAW

To determine if the sanctions section was carried out "satisfactorily," we determined whether the government developed plans and policies and implemented procedures that could reasonably be expected to (1) educate employers about their requirements under the law and (2) identify and fine violators. We found that INS and Labor have generally fulfilled their responsibilities under this definition of "satisfactorily." However, we also found that INS could improve its methods for determining employer compliance with the law's requirements.

As of September 1989, INS had issued notices of intent to fine employers for about 3,500 violations for knowingly hiring or continuing to employ unauthorized aliens. There were also about 36,000 violations for not completing the verification forms. The total fines assessed were about $17 million. Our review of about 300 randomly selected employer sanction case files showed that INS field offices had correctly carried out the Commissioner's policy on employer fines. Between September 1987 and September 1989, Labor officials completed over 77,000 inspections of employers' verification forms.

Following the government's extensive efforts to educate employers, including direct contact with over 2 million employers, GAO estimates that 3.8 million (83 percent) of the 4.6 million employers in the survey population were aware of the law. Of the 2.4 million employers who were aware of the law and hired at least one employee during 1988, GAO estimates that 1.6 million (65 percent) reported being in full compliance with the verification requirement.

NO EVIDENCE OF FRIVOLOUS COMPLAINTS

Our review of me Office of Special Counsel and the Equal Employment Opportunity Commission's discrimination data found no evidence of frivolous IRCA discrimination complaints to harass employers.

EMPLOYERS REPORTED DISCRIMINATORY PRACTICES RESULTING PROW THE LAW

On the question of discrimination, our survey results indicated that national origin discrimination resulting from IRCA, while not pervasive, does exist at levels that amount to more than "just a few isolated cases" and constitutes "a serious pattern of discrimination." We estimate that 461,000 (or 10 percent) of the 4.6 million employers in the survey population nationwide began one or more practices that represent national origin discrimination. The survey responses do not reveal whether the persons affected by the discrimination were eligible to work. However, given that these employers hired an estimated 2.9 million employees in 1988, we believe it is reasonable to assume that many eligible workers were affected.

An estimated 227,000 employers reported that they began a practice, as a result of IRCA, not to hire lob applicants whose foreign appearance or accent led them to suspect that they might be unauthorized aliens. Also, contrary to IRCA, an estimated 346,000 employers said that they applied IRCA's verification system only to persons who had a foreign appearance or accent. Some employers began both practices.

Employers reported that they engaged in practices which under the law would be classified as discriminatory verification and hiring practices. These employers were in a variety of industries and areas of

the Nation and included firms of various sizes. The levels of discrimination ranged by geographical location from 3 to 16 percent and were higher in areas having high Hispanic and Asian populations.

These employer responses specifically related the discriminatory hiring and verification practices to IRCA. Therefore, they represent "new" national origin discrimination that would not have occurred without IRCA. There is no evidence that would lead us to believe that employers who said they discriminated as a result of IRCA did not. But even if some employers did not report accurately, the remaining group would be substantial.

Since these data meet the criteria in the law and its legislative history, we concluded that the national origin discriminatory practices reported do establish a widespread pattern of discrimination. On the basis of the information available, we determined that it is more reasonable to conclude that a substantial amount of these discriminatory practices resulted from IRCA rather than not.

Finally, our hiring audit of 360 employers in Chicago, Illinois, and San Diego, California, showed that the "foreign-appearing, foreign-sounding" Hispanic member of the matched pairs was three times more likely to encounter unfavorable treatment than the Anglo non-foreign-appearing member of the pairs. For example, the Anglo members received 52 percent more job offers than the Hispanics. These results, taken together with the survey responses, show a serious problem of national origin discrimination that we believe IRCA exacerbated.

EMPLOYERS REPORTED OTHER FORMS OF DISCRIMINATORY PRACTICES

While our statutory determination is limited to national origin discrimination that can be linked directly to IRCA's sanctions section, our survey results indicate that the law also resulted in citizenship discrimination.

We estimate that an additional 430,000 employers (9 percent) said that because of the law they began hiring only persons born in the United States or not hiring persons with temporary work eligibility documents. These practices are illegal and can harm people, particularly those of Hispanic and Asian origin.

Adding these employers to those who began national origin discrimination, we estimate that 891,000 (19 percent) of the 4.6 million employers in the survey population nationwide began one or more discriminatory practices as a result of the law.

EMPLOYERS WANT IMPROVED VERIFICATION SYSTEM

About 78 percent of employers said they wanted a simpler or better verification system. The portion of employers who wanted these changes was 16 to 19 percent greater among those who reported discriminatory practices than among those who did not report discriminatory practices. We believe the responses tend to reflect employers' confusion and uncertainty about the law's verification system and that a simpler system that relies on fewer documents could reduce discrimination.

Contributing to the uncertainty that arises from the variety of documents in use is the prevalence of

counterfeit documents. INS apprehensions of unauthorized aliens show they commonly have counterfeit or fraudulently obtained documents—Social Security cards or one of the various INS alien work eligibility cards. By the mid-1990s, INS plans to (1) reduce from 10 to 2 the number of work eligibility cards it issues and to make these 2 cards more difficult to counterfeit and (2) replace over 20 million old INS cards with the new ones. However, this schedule depends on additional funding and personnel. Unless this process is expedited, little will be accomplished in the near term to reduce employer confusion and uncertainty about aliens' work eligibility status.

IMPROVED VERIFICATION SYSTEM NEEDED IF SANCTIONS ARE RETAINED

We identified three possible reasons why employers discriminated: (1) lack of understanding of the law's major provisions, (2) confusion and uncertainty about how to determine eligibility, and (3) the prevalence of counterfeit and fraudulent documents that contributed to employer uncertainty over how to verify eligibility.

Our work suggests that the discrimination we found could be reduced by (1) increasing employer understanding through effective education efforts, (2) reducing the number of work eligibility documents, (3) making the documents harder to counterfeit, thereby reducing document fraud, and (4) applying the new documents to all members of the workforce.

Such actions would make it easier for employers to comply with the law. They would relieve employer concerns about counterfeit documents. And they would reduce employer confusion over the many

documents which can now be used for verifying work eligibility.

Congress anticipated that the verification system might need improvement. Section 101(a)(1) of IRCA establishes procedures governing proposals to improve the employment verification system. The section specifies that improvements to the verification system proposed by the President should provide for reliable determinations of employment eligibility and identity, be counterfeit-resistant, protect individual privacy, and not be used for law enforcement purposes unrelated to IRCA.

Reducing the number of eligibility documents will raise many concerns—ranging from civil liberty issues to cost and logistics issues. Should Congress opt for this solution, it will have to carefully weigh these concerns as it pursues the dual objectives of assuring that jobs are reserved for citizens and legal aliens and reducing discrimination in the employment process.

MATTERS FOR CONGRESSIONAL CONSIDERATION

In summary, the discrimination we found is serious and requires the immediate attention of both Congress and the Administration. There are two ways to proceed.

One way is to rely upon the President to propose verification system changes he deems necessary, pursuant to the provisions of section 101(a)(1) of IRCA. This course would leave the initiative for action up to the executive branch. However, the necessary changes would require extensive debate and discussion between the legislative and executive branches before a final decision could be made on the solution.

The second alternative is for Congress to initiate discussions with the executive branch and interested parties on solutions to the IRCA verification problem that should be considered in light of our findings. This alternative could expedite the process, given the lengthy time frames set by section 101(a)(1).

In the final analysis, Congress has the following options: (1) leaving the sanctions and antidiscrimination provisions of the law as is for the present time, (2) repealing these provisions, or (3) leaving the current provisions in place and enacting legislation to amend IRCA's verification system to reduce the extent of discrimination resulting from IRCA.

The exact nature of the solution will emerge only after the debate that is inherent in the democratic process.

Should Congress decide to retain sanctions and improve the current verification system, three principles for improving the system while reducing discrimination need to be kept in mind. These are: (1) reducing the number of work eligibility documents, (2) making the documents mare counterfeit-resistant and less vulnerable to being used fraudulently, and (3) applying any reduced work eligibility documents to all members of the workforce. Congress could then defer further consideration of repealing the sanctions and antidiscrimination provisions of IRCA until a simpler and more reliable verification system has been in place for sufficient time to evaluate its effectiveness.

* * * *

That concludes my prepared statement. My colleagues and I will be pleased to answer questions.

EXHIBIT 21

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA
PHOENIX DIVISION

Case No. CIV-07-1684-PHX-MHB
Consolidated with Case No. CIV-07-1355-PHX-NVW

CHICANOS POR LA CAUSA, INC; and
SOMOS AMERICA,
Plaintiffs,

vs.

JANET NAPOLITANO *et al.*,
Defendants.

SUPPLEMENTAL DECLARATION OF EDMUNDO HIDALGO

DECLARATION OF EDMUNDO HIDALGO

I, Edmundo Hidalgo, declare as follows:

1. I am employed as Chief Operating Officer for Chicanos Por La Causa, Inc. ("CPLC"), located at 1112 E. Buckeye Rd., Phoenix, Arizona, 85034.

2. On September 6, 2007, I executed a declaration with respect to the challenge of Chicanos Por La Causa, Inc. ("CPLC"), to the Legal Arizona Workers Act (the "Act). This declaration supplements my pier declaration.

3. CPLC has determined that, unless the Act is nullified, CPLC will need to use the Basic Pilot

Program to verify employment eligibility for two separate reasons.

4. First, the Act requires CPLC to do so. Ariz. Rev. Stat. §23-214. Although it understand that the defendants in this case have taken the position that there is no penalty or enforcement mechanism for this requirement, CPLC still intends to follow the law both because from time to time we are called upon to certify in various documents that we are not in violation of any laws and because it is important in our country for all people to follow the law.

5. Second, using the Basic Pilot Program affords a rebuttable presumption against liability for intentionally or knowingly employing an unauthorized alien. Ariz. Rev. Stat. §23-212(I). In the event that CPLC ever has to defend itself; CPC believes it important to be able to make use of the rebuttable presumption. Because it will be too late to obtain the rebuttable presumption once an enforcement action has begun, CPLC will begin using the Basic Pilot Program if the Act takes effect.

6. If the Court finds that the Act is invalid, then CPLC will not incur the costs and obligations of using the Basic Pilot Program.

I declare under penalty of perjury that the foregoing is true and correct under the laws of the State of Arizona and the United States of America.

Executed on October 4, 2007, at Phoenix, Arizona.

/s/ Edmundo Hidalgo
Edmundo Hidalgo

EXHIBIT 23

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA
PHOENIX DIVISION

Case No. CIV-07-1684-PHX-MHB

CHICANOS POR LA CAUSA, INC.;
and SOMOS AMERICA,
Plaintiffs,

vs.

JANET NAPOLITANO, *et al.*,
Defendants.

DECLARATION OF EDMUNDO HIDALGO IN SUPPORT OF PRELIMINARY INJUNCTION

DECLARATION OF EDMUND HIDALGO

I, Edmund Hidalgo, declare as follows:

1. I am employed as Chief Operating Officer for Chicanos Por La Causa, Inc. ("CPLC"), located at 1112 E. Buckeye Rd., Phoenix, Arizona, 85034.

2. CPLC is a community development corporation committed to building strong, healthy communities as a lead advocate, coalition builder, and direct service provider in the state of Arizona. CPLC promotes positive change and self-sufficiency to enhance the quality of life for the benefit of those served by CPLC.

3. CPLC was formed in 1969, and is today Arizona's largest community development corporation, and one

of the largest in the nation. CPLC is recognized nationally and internationally for its model programs, and was recently named second in the nation in Hispanic Business Magazine's annual listing of the "Top 25 Hispanic Non-Profits."

4. CPLC currently employs more than 600 people in the State of Arizona. CPLC also uses independent contractors throughout the state, operates offices in fourteen of the fifteen Arizona counties, and serves the needs of over 125,000 individuals annually.

5. CPLC offers a wide range of programs and services, providing traditional social programs such as mental health care and domestic violence prevention, charter schools and other educational programs, and various housing options for seniors and families.

6. In addition to traditional social programs, CPLC has several subsidiaries devoted to economic development, including small business loans, commercial development, and workforce development.

7. Most of the funding for CPLC's programs comes from private donations and grants. In 2005, ninety percent of all annual funds received by CPLC were applied to direct services.

8. Among the direct services provided by CPLC to persons throughout the state of Arizona are financial assistance to prevent rental eviction or mortgage foreclosure; move-in assistance to those who are homeless; emergency shelter and transitional living services; residential treatment for individuals with drug and alcohol dependency; emergency food assistance; pre-natal health care for low-income pregnant women; early childhood development programs for children of farm workers through Migrant and Seasonal Head Start; teen drug and alcohol prevention

programs; M.E.T.A.S (Making Education Translate into Advancement and Success), which helps students prepare for college by providing the college experience to students beginning in the 10th grade; HIV/AIDS awareness programs; youth scholarship, mentoring, and leadership programs; and programs to assist individuals in obtaining their United States citizenship.

9. Although CPLC currently complies with federal law to verify the eligibility of its employees to work in the United States, CPLC does not currently use the voluntary Basic Pilot Program. CPLC believes that complying with the employer sanctions and verification provisions of the Arizona Legal Workers' Act ("the Act") will harm CPLC by requiring it to divert resources from its programs for implementation, training, and proper use of the Basic Pilot Program as a means of verifying employment eligibility of its employees.

10. CPLC is concerned that using the Basic Pilot Program would impose added costs and obligations on CPLC, including registering for the program and training its employees statewide in its proper use, as well as entering into and complying with Memorandum of Understanding ("MOU") with the federal government, and using the Basic Pilot Program for each new hire.

11. On or before October 1, 2007, the Act requires the Arizona Department of Revenue to notify every employer in the state of Arizona about what employers must do to be in full compliance with the Act when it takes effect on January 1, 2008.

12. Beginning January 1, 2008, in compliance with the Act, every employer in the state of Arizona, after

hiring an employee, will be required to verify the employment eligibility of the employee through the Basic Pilot Program.

13. CPLC anticipates that beginning in October 2007, following the receipt of the notice regarding compliance with the Act from the Department of Revenue, it will need to divert revenue from its current programs and services to meet the additional costs and obligations associated with participating in the Basic Pilot Program and achieving compliance with the Act by January 1, 2008.

14. Because CPLC spends ninety percent of its annual funds on providing direct services to persons in crisis, the diversion of resources that CPLC faces as a result of timely compliance with the Act will harm not just CPLC, but the entire statewide community that CPLC serves, As such, compliance with the Act will likely result in a decrease of the revenue available to be spent on programs and services provided by CPLC,

15. CPLC also believes the Act will cause harm to workers that are legally authorized to work in the United States and to their families. CPLC is particularly concerned that legally authorized workers, especially foreign-born workers and national origin minorities, will lose their jobs, not be hired for employment in Arizona in the first place, or otherwise be harmed because of the Act

16. CPLC is concerned that workers who are harmed by the Act will seek assistance from CPLC's programs and services stemming from their inability to obtain or maintain employment as a result of implementation and enforcement of the Act. CPLC believes it will experience an increase in requests

from persons harmed by the Act seeking emergency shelter, food assistance, and rental or mortgage assistance. CPLC is concerned that because of the diversion of resources from its programs and services in order to comply with the Act, it will not be able to meet the increased demand for assistance that will occur as a result of the harm suffered by workers under the Act.

I declare under penalty of perjury that the foregoing is true and correct under the laws of the State of Arizona and the United States of America.

Executed on September 6, 2007, at Phoenix, Arizona.

/s/ Edmund Hidalgo
Edmund Hidalgo

EXHIBIT 24

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA
PHOENIX DIVISION

Case No. CV-07-2518-PHX-SMM

VALLE DEL SOL, INC., *et al.*,
Plaintiffs,

vs.

TERRY GODDARD, *et al.*,
Defendants.

DECLARATION OF LUZ SARMINA IN SUPPORT OF TEMPORARY RESTRAINING ORDER AND PRELIMINARY INJUNCTION

DECLARATION OF LUZ SARMINA

I, Luz Sarmina, declare as follows:

1. I am employed as President and Chief Executive Officer of Valle del Sol, Inc., which is an Arizona non-profit corporation. Valle del Sol's corporate office is located at 4117 North 17th Street, Phoenix, Maricopa County, Arizona, 85016, with other service centers located throughout the Valley. Valle del Sol has "licenses" as defined by the Arizona Legal Workers' Act ("the Act") including articles of incorporation under Title 10 of the Arizona Revised Statutes.

2. Valle del Sol was formed in 1970, and today has grown to be one of Arizona's largest non-profit, community-based organizations. Valle del Sol helps men, women, children, families, and the elderly each year through counseling, substance abuse treatment, support services, and leadership development programs. Valle del Sol embraces these services with quality strategies, dedication and perseverance.

3. Valle del Sol promotes positive change and self-sufficiency to enhance the quality of life for the benefit of those served by Valle del Sol. Last year alone, Valle del Sol helped more than 21,000 individuals and their families. Valle del Sol is inspiring positive change by investing in human services, strengthening self-sufficiency for families, and building the next generation of Latino leaders.

4. Valle del Sol currently employs approximately 175 people in the State of Arizona, and also uses independent contractors throughout the State.

5. Valle Del Sol's mission is to empower the Latino community through advocacy and a continuum of culturally sensitive health services, partnerships, and social services. Valle del Sol is the premier agency focused on behavioral health, social services, leadership, and advocacy. We are committed to excellence in customer services, financial viability, planned growth, and community development in Arizona.

6. In addition to traditional social programs, Valle del Sol has a partner agency devoted to

economic development, including commercial development, and workforce development. It also has a subsidiary which solicits contributions of clothing and other non-monetary items.

7. Most of the funding for Valle del Sol's programs comes from private donations and grants. Among the direct services provided by Valle del Sol to persons throughout the state of Arizona are financial assistance to prevent rental eviction or mortgage foreclosure; parenting workshops; domestic violence prevention services, substance abuse, and suicide prevention classes; ESL classes (English as a Second Language); GED preparation; computer literacy; youth life skills and youth theatre workshops; school supplies; school uniforms; assistance obtaining food; referrals to community resources; education classes on topics such as changing roles, coping with loss, and healthy aging; counseling services; transition workshops to help seniors connect with others for support; home based prevention for seniors at risk; community and professional education for people who work with seniors; caregiver education and support for people who care for seniors; outpatient psychiatric services; case management services; family support services; intensive Outpatient Program (IOP) for substance abusing adolescents; home management; identifying and using community resources.

8. Valle del Sol currently complies with federal law to verify the eligibility of its employees to work in the United States, but Valle del Sol

does not currently use the voluntary E-Verify program. If the Arizona Legal Workers' Act takes effect, Valle del Sol will be forced to use the voluntary E-Verify system to verify employment eligibility. Not only does the Act require employers to use E-Verify (Ariz. Rev. Stat. §23-214), but it also provides a rebuttable presumption against liability for intentionally or knowingly employing an unauthorized alien (Ariz. Rev. Stat. §23-212(I)) and allows for enhanced penalties if E-Verify is not used (Ariz. Rev. Stat. §23-212(F)(1)(d)(ii), (iv), (2)(c)(ii), (iv). Valle del Sol fears that if it does not use E-Verify and a new employee turns out to be unauthorized, Valle del Sol may not have as strong a defense under the Act and may be subject to harsh penalties. In addition, some of the grants that Valle del Sol receives require a certification that Valle del Sol is in compliance with all State laws. Valle del Sol currently has some grants with such a certification requirement and anticipates applying for grants with such a certification requirement in 2008 and beyond. If Valle del Sol is unable to certify that it is in compliance with the E-Verify mandate of the Act, Valle del Sol will be ineligible for grants that it currently has and others for which it will apply.

9. Valle del Sol is concerned that using E-Verify would impose added costs and obligations on Valle del Sol, including registering for the program and training its employees in its proper use, as well as entering into and complying with Memorandum of Understanding ("MOU") with the federal government,

and using E-Verify for each new hire. If the Act does not take effect, Valle del Sol will not use E-Verify and will not incur the attendant costs and obligations.

10. Valle del Sol believes that complying with the employer sanctions and verification provisions of the Act will also harm Valle del Sol by requiring it to divert resources from its programs for implementation, training, and proper use of E-Verify as a means of verifying employment eligibility of its employees. Because Valle del Sol spends ninety percent of its annual funds on providing direct services to persons in crisis, the diversion of resources that Valle del Sol faces as a result of timely compliance with the Act will harm not just Valle del Sol, but the entire county-wide community that Valle del Sol serves. As such, compliance with the Act will likely result in a decrease of the revenue available to be spent on programs and services provided by Valle del Sol. If the Act does not take effect, Valle del Sol will not use E-Verify and will not have to divert resources to the program.

11. Valle del Sol also believes the Act will cause harm to workers that are legally authorized to work in the United States and to their families. Valle del Sol is particularly concerned that legally authorized workers, especially foreign-born workers and national origin minorities, will not be hired for employment in Arizona in the first place, will lose their jobs, will have to undertake additional efforts to demonstrate that they are autho-

rized to work, or will otherwise be harmed because of the Act.

12. Valle del Sol is concerned that workers who are harmed by the Act will seek assistance from Valle del Sol's programs and services stemming from their inability to obtain or maintain employment as a result of implementation and enforcement of the Act. Valle del Sol believes it will experience an increase in requests from persons harmed by the Act seeking emergency shelter, food assistance, and rental or mortgage assistance. Valle del Sol is concerned that because of the diversion of resources from its programs and services to comply with the Act, it will not be able to meet the increased demand for assistance that will occur as a result of the harm suffered by workers under the Act.

I declare under penalty of perjury that the foregoing is true and correct under the laws of the State of Arizona and the United States of America.

Executed on December 12, 2007 at Phoenix, Arizona.

/s/ Luz Sarmina
Luz Sarmina

EXHIBIT 25

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA
PHOENIX DIVISION

Case No. CV-07-2518-PHX-SMM

VALLE DEL SOL, INC., *et al.*,
Plaintiffs,

vs.

TERRY GODDARD, *et al.*,
Defendants.

DECLARATION OF TYLER MORAN IN SUPPORT OF TEMPORARY RESTRAINING ORDER AND PRELIMINARY INJUNCTION

DECLARATION OF TYLER MORAN

I, Tyler Moran, declare as follows:

1. I am the Employment Policy Director at the National Immigration Law Center (NILC). I have been employed with NILC from 2002 to the present.

2. NILC is a national legal advocacy organization whose mission is to advance and promote the rights of low-income immigrants and their family members. NILC has trained over 10,000 advocates, attorneys, and government officials on how to identify and combat citizenship and national origin discrimination.

NILC's work also helps protect the employment rights of all employees, regardless of immigration status.

3. As NILC's Employment Policy Director, one of the major issues I concentrate on is the federal employment eligibility verification program that used to be called the "Basic Pilot Program" and has recently been re-named "E-Verify," and its impact on workers, particularly immigrant workers. Over the years, my work on this issue has included monitoring the impact of E-Verify on workers, analyzing proposals to expand the program, providing technical assistance to people across the country who have questions about how E-Verify functions, and training attorneys, unions, and advocates on the program.

4. NILC provides legal advice on cases involving workers who have been fired as a result of tentative non-confirmations under E-Verify generated either by the Social Security Administration (SSA) or the U.S. Citizenship and Immigration Service (USCIS) under the Department of Homeland Security (DHS). In addition, NILC has assisted employees and organizations in correcting tentative non-confirmations that E-Verify issues and educating employers and employees about the problems with E-Verify.

5. NILC's publications on E-Verify and its impact on immigrant workers are the leading resource for employee advocates across the country on this issue. I am also aware that state agencies, such as the Georgia Department of Revenue, and employer associations,

such as Chambers of Commerce, rely on NILC's publications. On June 7, 2007, I presented testimony before the U.S. House of Representatives Committee on Ways and Means, Subcommittee on Social Security regarding the problems with federal proposals to mandate the use of the E-Verify nationwide. A true and correct copy of my prepared testimony is attached as Exhibit A.

6. E-Verify is a voluntary program that allows employers to supplement the required federal employment verification system (commonly known as the I-9 process) by verifying newly hired employees' work authorization with the federal government over the Internet. The Basic Pilot (E-Verify) Program is described in the Statement of Richard M. Stana, Director of Homeland Security and Justice Issues, Government Accountability Office, before the Subcommittee on Social Security, Committee on Ways and Means, U.S. House of Representatives, June 7, 2007. A true and correct copy of this Statement is attached as Exhibit B. USCIS has also published the document "I am an Employer . . . How do I. . . Use E-Verify?" (September 2007), a true and correct copy of which is attached as Exhibit C.

7. E-Verify started in 1997 in five states (not including Arizona), and has been available nationwide since December 2004.

8. E-Verify works by electronically comparing data submitted by employers for newly hired workers such as name, date of birth, and social security number to information in federal SSA and DHS databases. The system

first uses the SSA database, the Numident File, to verify an employee's name, date of birth, social security number, and U.S. citizenship if the employee claims to be a U.S. citizen. For non-U.S. citizens, a check is also made against DHS databases and sometimes USCIS staff must manually check whether the employee is authorized to work. If the SSA or DHS is unable to verify the employee information, E-Verify issues a tentative non-confirmation. An employee may contest a tentative non-confirmation by contacting either SSA or USCIS to resolve inaccuracies in the records within eight federal working days. If an employee does not contest the tentative non-confirmation, it becomes a final nonconfirmation and the employer must either terminate the employee or notify DHS that the employer is not terminating the employee. This is not a true choice, because if the employer continues to employ the employee after receipt of a final nonconfirmation, a rebuttable presumption is created that the employer violated immigration law by knowingly hiring an unauthorized worker. Likewise, if an employee challenges the tentative nonconfirmation and DHS issues a final nonconfirmation, the employer must follow the same procedure.

9. I am familiar with the recently enacted Legal Arizona Workers Act that requires the mandatory use of E-Verify for all employers in the state. Attached as Exhibit D is a true and correct copy of the Signing Statement from Governor Janet Napolitano to the Honorable Jim Weiers, Re: House Bill 2779: fair and

legal employment (July 2, 2007). Attached as Exhibit E is a true and correct copy of a July 2, 2007 News Release from Governor Janet Napolitano. Attached as Exhibit F is a true and correct copy of a July 2, 2007 letter from Governor Janet Napolitano to the Honorable Nancy Pelosi, Speaker of the United States House of Representatives, and Senator Harry Reid, Senate Majority Leader. Attached as Exhibit G is a true and correct copy of a September 20, 2007 News Release from the Maricopa County Attorney.

10. Through my years of working on E-Verify issues, I have gained extensive knowledge of the continuing high error rates in the two databases used by the E-Verify that result in tentative non-confirmations. I have reviewed the various research studies of E-Verify conducted both by government evaluators and private research firms. Each of these reports reveals widespread errors in the databases E-Verify uses. For instance, the private research corporation Westat recently found in a report to DHS that the database used by USCIS for verification is not up-to-date enough to meet the statutory requirements for accurate verification. *Findings of the Web Basic Pilot Evaluation*, Westat, Sept. 2007.

11. I have direct knowledge of the broad range of reasons why individuals receive tentative non-confirmations from E-Verify, including delays in data entry into the SSA or USCIS databases such as lags in inputting information for newly naturalized U.S. citizens; inaccurate entry of information onto the form on

the E-Verify website by the employer; or name changes or changes in immigration status that are not reflected in SSA or USCIS databases; and many other legitimate reasons. The 2007 Westat report concludes that due to database errors: (1) over one in ten work-authorized non-citizens are initially categorized as *not* work-authorized by the program; (2) foreign-born workers, including those who have naturalized, are *30 times* more likely than native-born U.S. citizens to be incorrectly identified as not authorized for employment; and (3) almost 10 percent of naturalized U.S. citizens who are eventually found authorized to work initially received a tentative non-confirmation. Each of these data errors puts work-authorized individuals at risk of wrongful termination. A recent report by the SSA Office of the Inspector General (*Congressional Response Report: Accuracy of the Social Security Administration's NUMIDENT File*, Dec. 2006) estimated that 17.8 million SSA records contain discrepancies related to name, date of birth, or citizenship status, with 12.7 million of these discrepancies relating to U.S. citizen records. A true and correct copy of this report is attached as Exhibit H. A 2004 report by USCIS found "unacceptably high" tentative non-confirmation rates for foreign-born work-authorized employees and "higher than desirable" rates for U.S.-born employees. *Report to Congress on the Basic Pilot Program* (U.S. Citizenship and Immigration Services, June 2004), at 3, a true and correct copy of which is attached as Exhibit I. In addition, a December 2006 Audit

Report from the SSA Office of the Inspector General, *Impact of Unauthorized Employment on Social Security Benefits*, at 3, estimated that more than a third of work authorization information in SSA's database for nonwork Social Security numbers was not accurate. A true and correct copy of this Audit Report is attached as Exhibit J.

12. Through my work, I have seen many work-authorized immigrants—both U.S. born and foreign-born—receive tentative non-confirmations, and have observed the difficulties faced by these employees in resolving those discrepancies with the DHS or the SSA. Indeed, a 2002 report by the Temple University Institute for Survey Research and Westat entitled *INS Basic Pilot Evaluation: Summary, Report*, Jan. 29, 2002, found that 95 percent of workers who received tentative non-confirmations used personal time or time off from work to resolve these issues.

13. In my experience, it can often take employees much longer than eight federal working days to resolve tentative non-confirmations from E-Verify.

14. In addition, based on past experiences, many employers may simply terminate workers upon receipt of a tentative non-confirmation instead of allowing the worker to attempt to resolve the issue within the required eight-day period.

15. I am also familiar with situations where employers have run current workers through E-Verify (which is supposed to be limited to

new employees) as a means of intimidating workers involved in union organizing campaigns. A September 2006 Social Security Administration Office of the Inspector General report found that 30 percent of E-Verify users admitted they had verified the employment authorization of existing employees. I am also familiar with cases where employers have retaliated against employees who receive tentative non-confirmations under E-Verify. For example, the 2007 Westat report found that 22 percent of employers restricted work assignments, 16 percent delayed job training and 2 percent reduced pay while employees contested a tentative non-confirmation.

16. Based on my experience with the Legal Arizona Workers Act, the Act is likely to generate severe consequences for workers. Many employers will fire workers they believe to be "foreign" out of fear of the new state-created employer sanctions. This will result in discrimination against foreign-born workers and workers of color as employers assume that workers of certain races or ethnicities or those with accented speech are likely to lack work authorization or to generate E-Verify errors. In addition, other employers will use the Act as a pretext to retaliate against workers who have engaged in protected labor activities, such as union organizing, or sought to enforce their basic labor rights by bringing wage and hour, discrimination, or workers' compensation claims.

17. Based on my experience with the E-Verify program's capacity, it is my opinion that the

system will be unable to handle the increased demand placed on it if the Legal Arizona Workers Act is implemented.

18. According to the letter from the Governor attached as Exhibit F, under the Arizona law, the Governor believes between 130,000 and 150,000 new businesses will be added to E-Verify from Arizona. The GAO found in 2007 (Exhibit B at 89) that were the number of employers using E-Verify to increase significantly due to mandates to use E-Verify, the capacity of the system would be affected due to increased employer queries and the increased costs of hiring and training additional government staff to operate the program, respond to employer queries, and resolve an increasing number of tentative non-confirmations generated by the system.

19. Moreover, in 2006, USCIS officials reported to independent GAO evaluators that even at the current level of use, USCIS is unable to monitor employers' use of E-Verify due to "lack of staff available to oversee and examine employer use of the program." Statement of Richard M. Stana, Director of Homeland Security and Justice Issues, Government Accountability Office, before the Subcommittee on Immigration, Border Security, and Citizenship, Committee on the Judiciary, U.S. Senate, June 19, 2006, at 12. A true and correct copy of this Statement is attached as Exhibit K. The need for monitoring is illustrated by evidence I am aware of showing that employers routinely use E-Verify to inappropriately pre-screen job applicants or to re-verify the work

authorization status of current employees in violation of the programs requirements. It is my opinion that these problems with employer use of E-Verify would be exacerbated if the Arizona law is implemented and well over a hundred thousand new employers that did not even make a choice to use E-Verify are added to the system.

20. Based on my experience, I have observed that the E-Verify Program imposes significant costs on employers, particularly small employers. In order to participate in E-Verify, employers must purchase and maintain dedicated computer lines for a secure Internet connection, pay for required hardware, register for E-Verify, sign a Memorandum of Understanding (MOU) with DHS and SSA (a true and correct copy of which is attached as Exhibit L), become familiar with and comply with the program's 64 page manual, provide a tutorial for all staff members who use E-Verify, retrain staff when changes are made to the program, and absorb the costs of lost work time as staff are trained to screen new employees' work eligibility and forced to resolve problems with E Verify databases and data errors. Employers also incur indirect costs, such as reassignment of employees, additional recruitment, and delayed production. Several reports have documented the burdens imposed by the program on employers, which are greater for smaller employers. These reports have found that on average employers reported that they spent hundreds of dollars annually to use the program.

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

Executed this 12 day of December 2007, at Boise, Idaho.

/s/ Tyler Moran
Tyler Moran

EXHIBIT 26

UNITED STATES DISTRICT COURT
DISTRICT OF ARIZONA

No CV 07-2496-PHX-NVW
No. CV 07-2518-PHX-FJM

ARIZONA CONTRACTORS ASSOCIATION. INC., et al.,
Plaintiffs,

v.

CRISS CANDELARIA, et al.,
Defendants.

VALLE DEL SOL, INC., et al.,
Plaintiffs,

v.

TERRY GODDARD, et al.,
Defendants.

DECLARATION OF MARION
"MAC" MAGRUDER

I. Marion "Mac" Magruder, declare as follows:

1. I am the chairman of Wake Up Arizona! Inc. ("Wake Up Arizona!"), a non-profit corporation incorporated under the laws of the State of Arizona, with its principal place of business located in Phoenix, Arizona.

2. Wake Up Arizona! transacts business in Arizona and holds what are deemed to be licenses under A.R.S. § 23-211(7).

3. Wake Up Arizona! was formed to serve as a public policy advocate on behalf of Arizona employers and employees and urges the Arizona Legislature and Executive Branch agencies to adopt and implement policies that promote a favorable legal and business climate in Arizona.

4. Members of Wake Up Arizona! employ employees in the State of Arizona, transact business in Arizona, and hold licenses and permits from the State and/or its political subdivisions.

. 5. I am a member of Wake Up Arizona! and I own and operate seven McDonald's Restaurant franchises located in Maricopa County, Arizona. These restaurants employ employees in the State of Arizona, transact business in Arizona, and hold licenses and permits from the State and/or its political subdivisions. Approximately 90% of my McDonald's employees and five of the seven managers at my restaurants are Latino.

6. I have owned and operated McDonald's restaurant franchises for over forty-three years.

7. My McDonald's restaurants have always sought to comply with federal immigration laws since their inception in the employment of our employees, including training personnel on the proper procedures for I-9 forms and requiring all newly hired employees to provide proper documentation to satisfy I-9 requirements, in fact, within the last six months, I terminated the employment of one of my McDonald's employees after being informed that his I-9 form did not match federal records.

8. If all provisions of the Legal Arizona Workers Act (the "Act") go into effect on January 1, 2008, Arizona employers like me will be forced to sign up

for the federal E-Verify Program ("E-Verify") for at least two reasons. First, the Act requires participation in E-Verify. A.R.S. § 23-214. Second, under the Act, use of E-Verify provides a "rebuttable presumption" against liability for intentionally or knowingly employing an unauthorized alien. A.R.S. § 23-212(I). Because of the drastic penalties imposed by A.R.S. § 23-212(F) for intentionally or knowingly employing, an unauthorized alien, Arizona employers like me believe that they have no practical choice but to enroll in E-Verify so as to receive the benefit of that rebuttable presumption,

9. For the reasons stated in Paragraph 8 above, the McDonald's restaurants that I own and operate will be force to participate in E-Verify if all provisions of the Act take effect.

10. In order to enroll E-Verify I understand that employers must access E-Verify through a computer and the use of the Internet. I have determined that if all provisions of the Act take effect, I will therefore have to purchase a scanner and a dedicated line for each of my seven McDonald's restaurants in order to participate in E-Verify.

11. I understand that my McDonald's restaurants and other Arizona employers will have to sign a memorandum of understanding ("MOU") with the federal government order to participate in E-Verify.

12. Pursuant to the MOU that all employers must sign to participate in E-Verify, I understand that employers must agree to: (i) become familiar with and comply with the E-Verify manual; (ii) force any employer representative who will perform employment verification inquiries under E-Verify to complete the E-Verify tutorial; (iii) only accept identity documents

with a photograph when accepting "List B" documents for an employee's I-9 form; (iv) notify the Department of Homeland Security ("DHS") if they continue to employ any employee after receiving a final nonconfirmation from E-Verify or be subject to a civil money penalty between $500 and $1,000; (v) complete the E-Verify process within three business days of hiring any new employee; (vi) allow the DHS and the Social Security Administration ("SSA") to inspect E-Verify-related records, including I-9 Forms, SSA transaction records, and DHS verification records; (vii) make its employees available for interviews with the DHS and the SSA regarding their experience with E-Verify; and (viii) follow certain procedures and provide the employee with certain records if the employer receives a "tentative nonconfirmation" from E-Verify on that employee.

13. If forced to use E-Verify, Arizona employers like me would incur the costs for time to install and learn the software, complete the tutorial, sign the required MOU, submit information regarding new employees, and otherwise comply with the numerous requirements agreed to in the E-Verify MOU, as stated in Paragraph 12 above. It will be expensive and time-consuming for my McDonald's restaurants and other Arizona employers to undertake all these requirements.

14. In operating my McDonalds restaurants, I currently incur costs equaling one percent (1%) of the total payroll, paid to a third-party human resources company. to comply with federal immigration laws and to fulfill other necessary human resource functions. These expenses are directly attributable to the enactment of the Act, and I could move these functions back in-house and save costs if not for the

Act. When my McDonald's restaurants are forced to participate in E-Verify, I anticipate that my costs paid to this third-part [sic] human resources company will increase to one and a half to two percent (1 1/2%-2%) of the total payroll.

15. Since the passage of the Act, Latino employees at my McDonald's restaurants have been subjected to vulgar and vicious verbal abuse by customers or other persons they have come into contact with at work. These persons have accused my employees of not being in the country legally and have threatened to report them to authorities. This abusive, hostile, and harassing conduct increased sharply this fall, at the same time that the enactment of the Act began receiving widespread publicity.

16. Employees at my McDonald's restaurants have been instructed not to wear nametags because of a fear that numerous problems would arise, including further verbal abuse as described in Paragraph 15 above, if customers or other persons were to see Latino names on those tags.

17. Based on my forty-three years a experience in the fast-food business, I have observed that fast-food businesses tend to maintain stable growth even during poor economic times. However, since November 1, 2007, my McDonald's restaurants have experienced a substantial decline in revenue. Other Arizona employers have reported a similar decrease in revenue at their businesses since November 1, 2007.

18. Based on my observations, and reports of other Arizona employers to me, businesses located in areas heavily populated by Latinos have experienced the largest decrease in revenue since November 1, 2007,

19. Based on my forty-three years of experience in the fast-food business, this is one of the most difficult times I have ever had in hiring a sufficient number of employees for my McDonald's restaurants. There are simply not enough people in the labor pool in Arizona to fill my needs. Other Arizona employers have reported the same difficulties in hiring a sufficient number of employees to me.

20. Because of the Act, I anticipate losing numerous Latino employees at my seven McDonald's restaurants because of their fear that the Act will be improperly used to harass them and members of their family. Based on the current shortage in the labor pool in Arizona these employees will be extremely difficult or even impossible to replace.

I declare under penalty of perjury that the foregoing is true and correct,

Executed on December 21, 2007

/s/ Marion "Mac" Magruder
Marion "Mac" Magruder
Chairman
Wake Up Arizona! Inc.

EXHIBIT 27

DECLARATION

I, Jason LeVecke, declare under penalty of perjury that the following is true and correct.

1. I am over the age of 18 and am a resident of Maricopa County, Arizona.

2. I have personal knowledge of the matters stated in this Declaration.

3. I am a member of several of the business associations that have brought the legal actions to challenge the constitutionality of the Legal Arizona Workers Act.

4. I am the CEO of MJKL Enterprises which is a franchisee of Carl's Jr. Restaurants.

5. My company owns and operates 57 restaurants in the State of Arizona and employs approximately 1,100 employees.

6. My company has always done its utmost to comply with federal immigration laws in the employment of our employees. We have trained our personnel on the proper procedures for I-9 forms and conscientiously require proper documentation in satisfaction of I-9 requirements for all newly hired employees.

7. As a result of the enactment of the Legal Arizona Workers Act, our company hired a full-time immigration compliance officer. That employee's sole duty is to monitor and ensure compliance with immigration laws.

8. Our company has investigated the costs of enrolling and participating in the E-Verify system. We have determined that it will cost more than $60,000 for our company to enroll in the E-Verify program.

9. The reason for the high cost for my company to participate in the E-Verify program is that hiring and immigration compliance is, done at each restaurant location. Applicants and newly-hired employees do not report to a central location in my company.

10. My restaurants do not have computers that may be used to access the E-Verify system on the Internet. The requirements of credit card processing companies is that the computers used in the restaurants to process credit card transactions cannot be equipped to have access to the Internet. Consequently, my company would have to purchase new, dedicated computers with Internet capabilities at each restaurant.

11. Since the passage of the Legal Arizona Workers Act, the Latino employees at my restaurants have reported that they have been subjected to vulgar, vile, vicious, verbal abuse by persons accusing them of not being in the country legally and threatening to report them to authorities. There was a marked increase in such abusive, hostile and harassing conduct directed at our Latino employees this fall, with all of the attendant publicity regarding the enactment of the Arizona employer sanctions immigration legislation.

12. As a result of the Legal Arizona Workers Act, I have curtailed plans to open new restaurants in Arizona. My company has decided to open new locations in other states rather than in Arizona because of the costs and risks created by the Legal Arizona Workers Act.

DATED this 17 day of December, 2007.

/s/ Jason LeVecke
Jason LeVecke

EXHIBIT 28

DECLARATION

I, Carla Brandt, declare under penalty of perjury that the following is true and correct.

1. I am over the age of 18 and am a resident of Maricopa County, Arizona.

2. I have personal knowledge of the matters stated in this Declaration.

3. I am employed by a business that is a member of the Arizona Employers for Immigration Reform.

4. On or about September 28, 2007, our business received a voicemail that stated the following:

> This is a message from Maricopa County Sheriff's Office—Illegal Immigration Task Force. We've had multiple complaints on our hotline pertaining to your company's hiring of illegal immigrants. This is a courtesy call to inform you that an investigation will soon proceed and we hope you use this opportunity to rectify this situation before someone from our Task Force contacts you. If you have any questions regarding this message, please call our illegal immigration hotline—602-876-4154. Leave your company's name and number and we will promptly return your call. Thank you for your time.

5. I recorded the voicemail and gave the tape to our attorney, Julie Pace, of Ballard Spahr Andrews & Ingersoll LLP.

DATED this 20 day of December, 2007.

/s/ Carla Brandt
Carla Brandt

EXHIBIT 36

Report of Expert Marc R. Rosenblum, Ph.D.
Associate Professor of Political Science
University of New Orleans

Case: *Arizona Contractors Association, Inc. et al. v. Janet Napolitano et al.*

Qualifications

My background and qualifications are noted on my CV, which is attached hereto as Exhibit 1, and incorporated herein by reference.

Report

Introduction

For many years, immigration analysts and policy experts have identified interior enforcement in general, and worksite enforcement in particular, as the Achilles heel of the US immigration control system (e.g., US Select Commission on Immigration Reform 1980; US Commission on Immigration Reform 1997). In short, the overwhelming majority of undocumented immigrants to the United States migrate in pursuit of employment, and the effective elimination of the "job magnet" would therefore discourage future undocumented migration. Yet interior enforcement presents a set of challenges that differs fundamentally from enforcement at the border: whereas border enforcement seeks to prevent the entry without inspection of *all* potential crossers, interior enforcement is ultimately a screening problem, in which potential employers and others are tasked with identifying the legal residency status of individuals on a case by case basis. The United States lacks an institutional infrastructure to clearly make this determination, and policymakers designing interior

enforcement mechanisms therefore confront a dilemma: to set the standards too low guarantees that some undocumented immigrants will slip through the screening system and be granted undue rights within the United States, but to set the standards too high guarantees that some US citizens and other legal residents will be wrongly denied their due rights and privileges, and imposes harmful barriers to economic growth and prosperity.

Thus, a fundamental challenge for legislators is to ensure that interior immigration enforcement mechanisms are able to identify and exclude those they are designed to screen out, without wrongly penalizing others who may "seem" undocumented. The Legal Arizona Workers Act, A.R.S. §§ 23-211 through 214 (the Act) strengthens worksite enforcement by suspending or revoking business licenses for employers who knowingly employ unauthorized workers. With these enhanced penalties along with new reporting requirements, the Act would likely produce some reduction in unauthorized employment in Arizona, though these benefits will likely be modest and illegal employment would undoubtedly continue. And the failure to include appropriate due process protections, along with flaws in the existing federal verification infrastructure, essentially guarantees that the Act also will produce a number of unintended consequences, including the wrongful termination of work-authorized individuals, discriminatory hiring process (mainly to the detriment of Hispanic workers), falling wages, and burdensome costs to Arizona employers with negative consequences for overall productivity in the state.

The first part of this report summarizes the federal immigration workplace enforcement system, including

the universal document-based "I-9" system established by the 1986 Immigration Reform and Control Act (IRCS) and the limited electronic "Basic Pilot" system established by the 1996 Illegal Immigration Reform and Immigrant Responsibility Act. Section two of this report identifies three main flaws with the federal system: (1) its failure to prevent all cases of unauthorized employment (i.e., the system returns "false positives"), (2) its failure to permit all cases of authorized employment (i.e., the system returns "false negatives"), and (3) its discriminatory error pattern (i.e., the victims of these "false negatives" are disproportionately foreign-born and/or of Hispanic descent). Section three of this report summarizes the Legal Arizona Workers Act, which imposes new requirements on Arizona employers and imposes new penalties on employers found to have hired unauthorized employees. Section four identifies three likely unintended consequences of the Act: (1) an increase in discriminatory hiring practices ("defensive hiring"), (2) the wrongful termination of work-authorized employees whose status cannot be confirmed by the federal electronic verification system, and (3) the pre-emptive termination of additional work-authorized employees by risk-averse employers to avoid potential penalty ("defensive firing"). Section five addresses three additional issues addressed by the court in its 21 December 2007 denial of plaintiffs' request for a temporary restraining order: (1) the likely effect of the Act on wages and unauthorized employment, (2) the costs to employers and overall economic productivity in the state, and (3) whether or not the Act conflicts with Congress' intended balance among the needs of employers, workers, and the goals of enforcement. In the context of discussing the balance between state and federal responsibility for

immigration enforcement, section five also addresses a fourth issue: (4) the relationship between immigration and US foreign policy.

1. Summary of the federal immigration workplace enforcement system

The 1986 IRCA made it illegal for employers to "knowingly employ" undocumented immigrants. The primary mechanism for preventing the employment of undocumented immigrants within the United States is the so-called I-9 document review process. Under this system, employees and employers are required to jointly complete a federal I-9 form every time a new employee is hired. The I-9 form requires the employee to provide his or her identity information, including Social Security number and Alien identification number if applicable, and to attest under penalty of perjury to their legal residency status (citizen, lawful permanent resident, or employment-authorized temporary immigrant). Federal law also requires employers to review one or more documents proving the identity and work-eligibility of the new employee, and the I-9 form requires employers to make a record of the forms reviewed and to attest under penalty of perjury that the documents appear genuine and appear to relate to the named employee. Employers are required by law to retain completed I-9 forms for three years after the date of hire or one year after the date employment ends, whichever is later.

In 1996, Congress passed the Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA), which included provisions to establish three separate pilots programs to address these weaknesses in the I-9 system by allowing employers to verify job applicants' status through phone or internet connections to the INS and SSA eligibility databases. Two of the

three pilots have since been discontinued, but the so-called Basic Pilot remains in operation and was expanded from its original six states to become a nationwide voluntary program in 2004. Approximately 19,000 employers were registered to use the Basic Pilot program as of August 2007, out of approximately 7 million employer firms nationwide (.25% of all employers), though only 4,300 employers actively use the program (.05% of all employers).[1]

Under the Basic Pilot system (now called E-Verify), participating employers still fill out the I-9 form as above, and then also submit employees' identification data (name, Social Security number, date of birth, Alien identification number if applicable) via a secure website for verification of the employee's work eligibility status. Electronic verification proceeds in four steps. First, all employees' data is automatically checked against the Social Security Administration's primary database, the Numident file. If an employee's data match information in the Numident database and SSA's records reflect that the person is a U.S. citizen, the Basic Pilot system issues an immediate confirmation that the employee is work-authorized. Second, if the data are not automatically confirmed by the SSA, the website returns a tentative non-confirmation (TNC). US citizens may appeal the TNC by personally visiting a SSA field office to resolve the problem. If the employee fails to appeal a TNC and resolve the data mismatch, a final non-confirmation is issued and employment must be terminated.

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[1] General Accounting Office 2006a; Institute for Survey Research (ISR)/Westat 2006; Department of Homeland Security 2007.

Third, for non-citizens, the SSA verification or tentative non-confirmation is followed by a secondary analysis by the US Citizenship and Immigration Service (USCIS), where identity and immigration status data from the I-9 are checked against the USCIS' Customer Processing System (CPS) database. If the CPS confirms the individual's work authorization, a confirmation is issued. If not, the case is automatically referred to an immigration status verifier (ISV), who manually checks the data against additional DHS databases before issuing a confirmation (if the individual's status can be verified) or a second TNC. Fourth, the job applicant then has the right opportunity to appeal the second TNC, a process which typically requires the employee to contact the ISV by telephone. If the employee is able to provide missing information necessary to resolve ambiguities in the record, a confirmation of work authorization is issued. If database ambiguities cannot be resolved, or if the individual fails to contest the TNC, a final non-confirmation is issued and employment must be terminated.[2]

2. *Flaws in the federal immigration workplace enforcement system*

The system is characterized by three well-documented problems.[3] First, neither the I-9 process nor the Basic Pilot is able decisively to identify undocumented job applicants. Thus, the system returns a certain number of "false positives," or cases in which undocumented immigrants are wrongly identified as work-authorized. Second, both the I-9 system and the

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[2] See Jernegan 2005 for a more detailed treatment of the history and mechanics of the Basic Pilot program.

[3] See, e.g. General Accounting Office 2006a; Rosenblum 2007.

Basic Pilot fail reliably to confirm the legal status of every work-authorized individual. Thus, the system returns a certain number of "false negatives," or cases in which work-authorized individuals are wrongly denied employment. Third, in practice, both the I-9 and Basic Pilot systems are discriminatory because legal non-citizens, foreign-born citizens, and native-born citizens of non-Anglo descent are, for a variety of reasons, far more likely to be wrongly identified as undocumented (i.e., to receive false negative findings).[4]

A) False Positives

The I-9 process fails reliably to detect all undocumented job applicants for the following reasons:

- The I-9 process is vulnerable to document fraud. Job applicants may present fraudulent documents ("fake ID's") to complete the I-9 form. Fake ID's are readily available in all American cities, and employers lack expertise to distinguish between legitimate and fraudulent documents. This problem is exacerbated by the I-9 rules, which allow job applicants to present a wide range of different documents to prove their identity and work eligibility and by anti-discrimination provisions which require employers to treat documents as genuine if they appear legitimate on their face.

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[4] A fourth problem—arguably the most significant—is that employer sanction provisions have never been aggressively enforced. This shortcoming is not inherent to the structure of the program, but rather a function of low congressional appropriations for interior enforcement and limited executive branch commitment to worksite enforcement. Poor enforcement will not be discussed in this report.

- The I-9 process is vulnerable to identity fraud. Job applicants may present borrowed or stolen *genuine* documents. In this case, employers would correctly judge the documents to be genuine, and must make a judgment call about whether or not the documents pertain to the individual job applicant before them.
- "Bad apple" employers may exploit these weaknesses, because federal authorities are unable to prove that they have knowingly hired an undocumented immigrant, rather than fallen victim to one of the shortcomings identified above.

The Basic Pilot generally prevents job applicants from obtaining employment through the use of fake ID's because the name and identification data on a fraudulent ID will not match the data in the SSA and USCIS databases. However, the Basic Pilot does nothing to prevent a job applicant from presenting a borrowed or stolen document as their own, in which case the data (which would pertain to a genuinely work-authorized individual) will be confirmed by the system. Experts agree that expansion of the Basic Pilot system is likely to lead to an increase in identity theft, a problem already estimated to affect 8.4 million Americans per year at an estimated cost of $49.9 billion.[5] Bad apple employers are likewise able to game the system by submitting data to the Basic Pilot which they know or suspect do not apply to the actual job applicant or running some but not all of

[5] Privacy Rights Clearinghouse 2007. These numbers are down from an estimated 8.9 million individuals and a cost of $56.6 billion in 2006.

their employees through the system, In this way, mandatory participation in the Basic Pilot (without additional improvements to the system under consideration by Congress) is likely to lead to more off-the-books employment, driving down wages of all workers.[6]

Between shortcomings in the I-9 process, and the Basic Pilot's inability to detect document fraud, even conscientious employers may unknowingly hire a substantial number of unauthorized workers. In one well-documented example, the meat processing firm Swift and Company was found to employ 1,282 workers thought to be unauthorized even though Swift had obtained I-9 documentation for each of their employees and has participated in the Basic Pilot program since its inception in 1997.[7]

B) False negatives

The I-9 process depends on employers' judgment, and well-intentioned employers who are concerned about preventing the employment of undocumented immigrants may err on the side of caution by failing to hire job applicants who look or seem as if they might be undocumented. This problem is exacerbated by employers' lack of training and by the complexity of the I-9 system.

The Basic Pilot eliminates the need for employers to make these judgment calls, but the structure of the system places the burden of proof of work eligibility on job applicants and their employers. In short, if the system fails to automatically confirm a job applicant for whatever reason, the applicant must prove that

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[6] Moran 2007

[7] Shandley 2007.

an error has occurred or, by law, be terminated from their place of employment. It bears emphasis that the logic of this system runs counter to the basic American principle that an individual is innocent until proven guilty; under the Basic Pilot all job applicants are *undocumented* until proven otherwise. This design choice is especially troubling because analysis of the Basic Pilot reveals a high number of false negative findings. The structure of this system produces false negatives for four distinct reasons:

i) Data entry error by employers at the point of hire. If employers enter incorrect information, the federal databases will not recognize employees as work-authorized, though the verification system makes use of logical algorithms to "look for" likely key stroke errors. According to the most recent analysis of Basic Pilot users, fifty-two percent of all employers received an erroneous tentative non-confirmation for one or more employers as a result of employers' data-entry errors.[8]

ii) Database errors. Neither the SSA nor the USCIS databases are reliably up-to-date.

- The most common errors in the SSA database pertain to legal name changes, which often take as long as a year or more to be recorded in the SSA database. Correcting these errors typically requires an individual to physically visit an SSA field office and present relevant documentation. A 2006 analysis of the SSA's NUMIDENT database found that 4.1 percent of cases analyzed contain discrepancies which would lead to incorrect responses in a Basic

[8] ISR/Westat 2006.

Pilot query, an error rate potentially affecting 17.8 million individuals.[9]

- The most common errors in the USCIS database pertain to the failure of other DHS agencies and offices (e.g., Border Patrol, USCIS field offices) to transmit information about immigrants' legal status to the USCIS's CPS database in a timely manner. Because the various DHS databases are not networked, it can take several weeks or more for work-authorized individuals to be recorded as such in the CPS database. A 2006 analysis of the DHS system for tracking A-files, the primary record for all immigrants in the United States, found that between one and four percent of all records could not be located. Missing A-files were much higher in busier regions, including a 20 percent missing record rate in the San Diego field office.[10]
- Both the USCIS and SSA databases make errors related to complex or unusual names, especially where transliterated names may be spelled multiple ways, or may be characterized by ambiguous word order (e.g., because individuals have multiple last names, hyphenated last names, or because the individual's family name precedes his or her given mune in normal usage).
- Both databases are also subject to routine data entry errors.

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[9] Social Security Administration 2006.

[10] General Accounting Office 2006b.

- While the precise error rate in the SSA and DHS databases cannot be estimated, *error rates are at least three percent for non-US citizens and 10.9 percent for naturalized citizens; best estimates suggest that actual error rates may be one-and-a-half times higher than these figures.*[11]

iii) Immigration status verifier (ISV) error. Where non-citizens' data are not confirmed automatically by the CPS database, the system is vulnerable to human error by the ISV assigned to a particular case. This error rate has not been estimated, but will likely increase as the system is rapidly scaled up and new, inexperienced status verifiers are brought on-line and case-loads expand. USCIS officials have expressed concern about their ability to bring additional ISV's on-line in time to handle increased workload associated with expansion of the Basic Pilot program.[12]

iv) Failure of employers or employees to understand/ follow the correct procedures in response to a TNC.

- Employers may treat a TNC as a final non-confirmation, terminating an employee without first giving the employee the right to appeal the INC as required by law. Statistic?
- Based on employers' self-reported statistics, 47 percent of employers screen job applicants or new hires before they begin work, meaning employees in receipt of a TNC are typically

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[11] These figures are based on the TNC rates for ever-confirmed participants in the Basic Pilot system surveyed by the 2006 ISR/Westat analysis; see below for further details.

[12] General Accounting Office 2007.

not offered employment and therefore never notified of the TNC.[13]

- Employers also fail to notify employees of their TNC or provide them with needed information to appeal the TNC. In this case, a final non-confirmation will be issued ten days later by default. At least 16 percent of employers in the ISR/Westat study fail to consistently provide workers with written notice of tentative non-confirmations, and many employers notify employees of TNC's but do not explain the appeals process.[14]
- Employers were also found to suspend employment, delay training, or otherwise penalize an employee who appeals a TNC until the TNC is resolved. In the latest ISR/Westat study, 19 percent of employers admitted to restricting work assignments while TNC's were pending; 14 percent delayed training while TNC's were pending; and two percent reduced pay while TNC's' pending. These numbers almost certainly under-estimate the actual rate of non-compliance because they rely on employer self-reporting of violations.[15]

Each of these problems contributes to false negatives; but it bears emphasis that the exact rate of

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[13] ISR/Westat 2006.

[14] Ibid. Previous research by the ISR/Westat team also found that 73 percent of job applicants in receipt of a TNC were not informed by the employers of this status, and that 39 percent of employees who sought to appeal a TNC did not recall receiving the printed instructions for doing so which employers are required by law to distribute. See ISR/Westat 2002.

[15] Ibid.

false non-confirmations cannot be measured because the overwhelming majority of employees in receipt of a Basic Pilot tentative non-confirmation never appeal the preliminary finding. We do not know what percentage of those who fail to appeal their TNC's are in fact work-authorized—but we do know that most employers fail to notify workers that they have received a TNC response or to provide adequate information for a TNC appeal, as discussed above. For this reason, *it is not safe to assume that an employee who fails to appeal a TNC is unauthorized to work in the United States*; and many legal workers have undoubtedly lost their jobs as a result of false Basic Pilot non-confirmations. A 2002 independent analysis of the Basic Pilot program found that 42 percent of employees who received *final non-confirmations* after their cases were referred to the INS for review (a non-random sub-sample of all final non-confirmations) were in fact work-authorized at the time of their referral.[16]

C) Discrimination, wage compression, and threats to privacy

The federal system of worksite immigration enforcement results in discriminatory outcomes, unfairly penalizing US citizens, legal permanent residents, and temporary immigrants of foreign descent in general and Hispanic descent in particular. These discriminatory outcomes are the result of four main tendencies under the current system:

i) "Defensive hiring." Many employers rationally respond to the threat of employer sanctions by avoiding hiring employees who "look" or "seem" undocu-

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[16] ISR/Westat 2002. The 2006 ISR/Westat study did not measure this statistic.

mented in their subjective determination. In the current context of the US immigration system, in which 80 percent of undocumented immigrants are Latin American, many employers use the information shortcut of assuming that all Latin Americans may be undocumented. A 1990 General Accounting Office analysis of employment practices found that this type of defensive hiring was especially widespread in the immediate aftermath of IRCA's passage, at which time employers were especially concerned about the threat of workplace enforcement:

- 5 percent of employers in their study "began a practice, as a result of IRCA, not to hire job applicants whose appearance or accent led them to suspect that they might be unauthorized aliens."[17]
- 9 percent of employers said that because of IRCA they "began hiring only persons born in the United States or not hiring persons with temporary work eligibility documents."[18]
- A "matched pair" survey of job applicants found that Anglo job applicants received 52 percent more job offers than Hispanic job applicants with identical records.[19]

The defensive hiring observed in the wake of IRCA's passage was a result of employers' rational calculation that the expected costs of possibly employing unauthorized workers were high—a function of IRCA's

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[17] General Accounting Office, *Immigration Reform: Employer Sanctions and the Question of Discrimination*. (Washington, DC: 1990).

[18] Ibid.

[19] Ibid.

penalties and the likelihood of being investigated—and by the absence of reliable verification mechanisms (along with weak anti-discrimination provisions in IRCA). Defensive hiring is likely to be far more extensive under the Arizona Act because the penalties for violating the act are far higher, and the likelihood of being investigated is far higher, while verification mechanisms remain unreliable and anti-discrimination provisions are essentially non-existent.

ii) Differential standards. Document discrimination—requiring Latino immigrants to provide more or different documents than non-Latinos—is the most frequent type of discrimination of this kind.[20] Because employers are uncertain about a job applicant's legal status, many employers assume all Latino workers may be undocumented and hold them to different standards in a variety of ways:

- The 1990 GAO study found that 7.5 percent of employers only required individuals to fill out I-9 forms if the person "had a 'foreign' appearance or accent."[21]
- Overall, the 1990 GAO survey found that 19 percent of all employers in their population engaged in one or more forms of national origin or related discrimination after IRCA' s implementation.[22]

iii) Other employers hire Hispanic job applicants, but pass along the risks of immigration enforcement to their employees by paying individuals who "look or seem undocumented" (i.e., Hispanics) lower wages

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[20] Christi 1995.

[21] GAO 1990.

[22] Ibid.

than are paid to similarly-qualified applicants who appear native-born.

- While the passage of IRCA had no measurable impact on the ability of undocumented immigrants to obtain employment in the United States, the imposition of employer sanctions made it "much more likely" that undocumented immigrants would earn below the US minimum wage, contrary to the pre-IRCA finding.[23]
- Latino non-agricultural wages fell by 9.6 relative to Latino agricultural wages during the initial post-IRCA period in which only non-agricultural employers were required to check status (Raphael 2001).[24]
- Latino wages fell by 6-7 percent relative to non-Latino wages as a result of the introduction of employer sanctions in general.[25]
- The real wages of legal immigrants fell 35 percent between 1980 and 1993. Analysts attribute most of this wage drop to IRCA, as wages fell 9 cents per year prior to IRCA and 27 cents per year after IRCA.[26]
- An analysis of US Census data found that workers of Mexican descent—including US citizens of Mexican descent—saw a "sizeable" decline in their hourly earnings relative to Cuban and Puerto Rican workers and relative

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[23] Donato and Massey 1993; also see Massey et al. 2002.

[24] Raphael 2001.

[25] Ibid.

[26] Massey et al. 2002.

to non-Latino white workers following IRCA's passage. This analysis concluded that employer sanctions adversely affected the earnings of Mexican workers.[27]

iv) Basic Pilot errors disproportionately affect non-native and foreign-descent individuals.

- Database errors discussed above (misspellings, reversed name order, etc.) are disproportionately likely to affect foreign-born individuals and individuals with atypical (from a US perspective) names.
- Because non-citizens must be confirmed by both USCIS and SSA databases, they have twice as many opportunities to be victims of database errors.
- In addition, the SSA database is generally more accurate than the USCIS databases—with the exception of foreign-born non-citizens, for whom the SSA database is unusually error prone.[28]
- The various DHS databases covering work eligibility are not networked, so that newly legal immigrant workers routinely face delays before their change of status is recorded in the CPS database.

While a significant number of erroneous TNC's are never detected, the 2006 ISR/Westat study traced the

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[27] Bansak 2005

[28] SSA database error rates differ for native-born citizens and immigrants because most native-born citizens are enrolled in the SSA database at birth, and their data are cross-checked against birth certificates. Immigrants' data are entered later, and must be updated with each change in immigration status.

Basic Pilot history of those eventually confirmed by the system, a subset of all work authorized individuals participating in the system. In this case, while only 0.1% of native-born US citizens were affected by database errors, error rates were at least 3% for foreign-born workers and at least 10.9% for naturalized US citizens. It bears emphasis that these numbers are lower—and probably a good deal lower—than actual database error rates because they do not count individuals receiving a false TNC who fail to correct their records. Given that a majority of employers pre-screen their employees and/or fail to provide them with written notification of how to appeal a TNC, inaccuracies in the databases are likely to roughly one-and-a-half times [sic] this measured rate.

v) Employer sanctions depress wages for all US workers. On one hand, because some employers pass along the expected costs of possible enforcement to their undocumented and legal immigrant employees in the form of lower wages, as discussed above, all US workers see their wages decline through "ripple effects" from this immigrant-based wage depression.[29] On the other hand, employer sanctions also empower "bad apple" employers who knowingly hire undocumented immigrants to use the threat of enforcement to intimidate workers who press for wage increases, seek to join labor unions, or complain about working conditions. All US workers see wages decline as a result of such coercion.[30]

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[29] Borjas et al. 1996.

[30] This problem is widely recognized, but difficult to measure since most cases of this type of employer abuse go unreported. Since 2001, the Equal Employment Opportunity Commission has worked with the Department of Justice, the Labor Depart-

vi) Basic Pilot exposes all US workers to greater risk of identity theft. The Basic Pilot process requires that employers obtain access to job applicants' personal and private citizenship and residency data. While employers are required by law to protect this data as a condition for participating in the Basic Pilot program, the 2002 ISR/Westat study found that half of all computers on which Basic Pilot queries were submitted were kept in unlocked rooms and that data in the system was generally vulnerable to being stolen by any "moderately competent computer user." In addition, 39 percent of employees were informed of problems with their Basic Pilot approval process in public settings, a further violation of privacy.[31]

Privacy and data security experts warn that the greatest problems associated with the Basic Pilot process concern the aggregation of core personal identification data in a single location, and creating a large number of user interface points with the system—a combination seen as highly attractive to those who traffic in stolen identity data. The current system *fails* to incorporate many standard security measures to safeguard these data, including high security in data transmission, and strict accountability for access to records. The current system is therefore seen as vulnerable to data theft, both in the form of database "hacking" and through a variety of

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ment's Occupational Safety and Health Administration, and several Latin American consulates to target this type of discrimination through its Justice and Equality in the Workplace Program.

[31] ISR/Westat 2002. The 2006 study does not address privacy issues in detail.

internet and email scams. As the system is expanded, these vulnerabilities will increase dramatically.[32]

3. Summary of Legal Arizona Workers Act

A) The following new enforcement provisions of the Legal Arizona Workers Act are relevant to this report:

- Section 23-212(B) of the Arizona statute establishes a procedure for filing a complaint alleging that an Arizona employer intentionally or knowingly employs unauthorized aliens. Upon receipt of such a complaint, the attorney general or a county attorney shall investigate the employer by submitting an inquiry to the federal government under 8 USC 1373(c), ostensibly to verify the work authorization status of the allegedly unauthorized alien(s).
- Section 23-212(C) requires the attorney general or county attorney to forward information about alleged undocumented immigrant(s) to federal and local law enforcement agencies and to forward information about alleged employment of unauthorized aliens to county attorneys.
- Section 23-212(D) requires county attorneys to bring an action against employers in the county where allegedly unauthorized employment has occurred. The statute appears to apply to any allegedly unauthorized employment occurring after January 1, 2008 (i.e., new and continuing employees), though the language is somewhat ambiguous.

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[32] Neumann 2007.

- Section 23-212(F) establishes the following penalties for employers who are found to have knowingly employed an authorized alien:

  1) The court shall order the employer to terminate all unauthorized aliens;

  2) The employer shall be required for three years to file quarterly reports with the county attorney describing all new hires;

  3) The employer shall be required to file a signed affidavit that the employer has terminated all unauthorized aliens, and has not intentionally or knowingly employed an unauthorized alien. The employer's business license(s) shall be suspended until the affidavit is filed, and may be suspended for up to 10 days regardless of whether the employer has filed an affidavit.

The lengths of the quarterly reporting period and of the suspension of business licenses are increased for intentional violations.

For a second violation in a three year period (or a five-year period for employers found to have intentionally employed unauthorized aliens), employers' business licenses shall be permanently revoked, a penalty Governor Napolitano has described as a "business death penalty."

B) The following procedural provisions are relevant to this report:

- Section 23-212(H) directs the court exclusively to consider the federal government's 1373 response as a "determination" of an employee's legal status.

- Section 23-212(I) establishes participation in the Basic Pilot program as a rebuttable presumption that an employer did not knowingly employ an unauthorized alien.
- Section 23-212(J) establishes that an employer who complies in good faith with requirements of 8 USC 1324b did not knowingly or intentionally employ an unauthorized alien. This appears to be a drafting error, since 8 USC 1324b concerns anti-discrimination provisions of the Immigration and Nationality Act; whereas 8 USC 1324a(b) concerns procedures for verifying workers' employment eligibility.[33]
- Section 23-214 establishes that the statute shall not be construed to require an employer to take any action that the employer believes in good faith would violate federal or state law.

C) Section 23-214 requires employers to verify the employment eligibility of new workers hired after December 31, 2007 through Basic Pilot; no penalties are specified for failure to comply with this provision.

4. Predicted Unintended Consequences of the Act

Based on the record of IRCA's implementation and what we know about the functioning of the Basic Pilot employment verification system, the Legal Arizona Workers Act is very likely to produce the following unintended consequences:

A) Increased de facto employment discrimination in the form of "defensive hiring"

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[33] Napolitano 2007.

- Under the threat of the enhanced penalties in section 23-212(F), many employers will be reluctant to hire workers they believe *might be* unauthorized to work in the United States—i.e., (for most employers) a foreign-born individual or an individual of Hispanic descent. As documented above, there is clear evidence that this type of employment discrimination occurred in the wake of IRCA's implementation, and that the credible threat of sanctions made de facto employment discrimination more likely. Roughly one million Arizona residents would be vulnerable to this type of discrimination.

- Legal workers will be victimized by the Arizona Act even where employers have no intention to practice discriminatory hiring because no reliable system exists to screen workers for eligibility. In short, where the penalty for making a hiring error is high, as would be the case under the Arizona Act, and where hiring decisions must be made in a context of uncertainty, as would remain the case given the weaknesses in the US verification system, some employers will rely on a variety of "informational shortcuts" and other tools to screen workers. This problem will be especially severe for firms with multiple locations and multiple agents making hiring decisions because foremen and other hiring agents will be reluctant to make a hiring mistake which jeopardizes their own employment; imposing centralized anti-discrimination "quality control" will be all but impossible under these circumstances.

- The likelihood of defensive hiring will increase in cases in which an employer is on probation and required to file quarterly reports on hiring practices. The quarterly reports themselves will likely have an extreme chilling effect on employers' and their agents' willingness to take the risk of hiring workers who seem like they *might be* undocumented. In addition, the enhanced penalties for a second violation would create a very strong incentive for employers and their agents to err on the side of a caution in their hiring practices.

- Use of the Basic Pilot system will not prevent false non-confirmations. The ISR/Westat study documents a wide range of flaws in the E-verify system as a function of database errors and of user errors resulting in an alarmingly high rate of false non-confirmations. Moreover, *both of these error rates are likely to increase as Arizona employers are compelled to participate in the program.* Database error rates will be higher in Arizona than in the national program because of Arizona's higher than average rate of foreign-born workers (17.9 percent, as compared to 14.7 percent nationally). User errors will be higher because current users self-select into the program, and are predominantly large firms with full-time human resources departments. As smaller and less conscientious firms are compelled to enroll in the program, user errors are likely to increase substantially, resulting in far more false non-confirmations. (For the same reason, compulsory participation in the Basic Pilot system will also likely to lead to increased rates of other problems

associated with Basic Pilot, including greater exposure of workers' private data, as described above.)

- The likelihood of defensive hiring is also increased by the Act's failure to include strong and unambiguous anti-discrimination language, and by the fact that federal anti-discrimination provisions are also weak and rarely enforced.[34] The Act fails to spell out penalties to discourage employers from adopting defensive hiring practices, and it also does not set aside resources to educate employers regarding their obligations and the rights of actual and potential employees under the Basic Pilot program. Education of this sort is especially important in literature of the Act's mandate that all employers participate in the program.

B) False negatives resulting in the termination of work-authorized employees

- The Act apparently allows anyone to bring a complaint against an Arizona employer for allegedly employing unauthorized workers. It is quite likely that many complaints will be filed for dubious reasons—including a general suspicion of particular employers or workers, and a specific effort to sabotage economic competitors. The deterrent effect for filing wrongful complaints is minimal because the standard is high for proving a frivolous complaint (complainant must have "knowingly" made a false *and* frivolous complaint to be penalized, with frivolous not defined in the

[34] Moran 2007; Napolitano 2007.

statute) and the penalty for doing so is low (Class 3 misdemeanor).

- The procedure for verifying workers' eligibility will lead to numerous false non-confirmations. The Act requires county attorneys to request eligibility verification from DHS through the procedures described in 8 USC 1373(c). Under this statute, Arizona officials may submit identity data to DHS for verification through the Basic Pilot system, but federal officials must attempt to make a determination of employment eligibility without the benefit of the procedural protections and opportunities for appeal found in the employer-based Basic Pilot. No mechanism exists for DHS agents to inform employees of their TNC response, or to provide them an opportunity to appeal the finding. As a result, *any employee whose identity cannot be automatically confirmed by the Basic Pilot databases will be determined to be ineligible without any opportunity to appeal the response* by the federal government that is deemed to be a determination. County attorneys will be relying on erroneous data in their investigations of complaints under the Act.

- Opportunities to appeal an erroneous non-confirmation appear extremely limited. The Act mandates that the DHS finding of eligibility or non-eligibility is the only evidence that the Court shall consider with respect to an individual's eligibility.

- Based on experience with the existing Basic Pilot program, this procedure will result in the wrongful non-confirmation of between

three and 4.5 percent of all legal immigrant workers in Arizona and between 10.9 and 16.4 percent of all naturalized US citizens in Arizona, in addition to .1-.15 percent of native-born US citizens. *Taken together, between 28,000 and 42,000 legal workers in Arizona would be non-confirmed by this system, including between 18,000 and 28,000 US citizens.*[35]

C) Increased de facto employment discrimination in the form of "defensive firing"

- Many employers will not wait for a determination by DHS and county attorneys, but will preemptively terminate employees they believe *might be* unauthorized to work in the United States to avoid the risk of punishment. Indeed, ample anecdotal evidence already exists in published media reports that this sort of defensive firing is already occurring?[36]
- For employers facing a complaint—even a dubious one—the risk of defensive firing is especially high because the standards for compliance are substantially greater than those found under the federal system. In particular, employers are not only prohibited from *knowingly* employing an unauthorized worker, but are also required to sign an affidavit that they are *not employing* any unauthorized workers. Moreover, the employer must sign

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[35] Calculations based on Arizona workforce data from US Census Bureau, 2005 American Community Survey (ACS); data provided by the Migration information Source (http://www.migrationinformation.org).

[36] See e.g., Jordan 2007; Archibold 2007.

such an affidavit within three days of a court order—a timeline which leaves employers precious little time to be notified of an order and take appropriate legal action. Moreover, even if an employer learns of an order immediately, the three-day timeline leaves too little time for employers to verify the status of all workers on their payroll, a task which employers are unable to accomplish in any event given prohibition on re-screening employers under existing federal law. Thus, in effect, the Act requires any employer facing a court order to choose among three courses of action: 1) preemptively fire any worker who *might possibly* be undocumented; 2) sign a sworn affidavit which may be false, and therefore risk perjury charges; or 3) face revocation or suspension of the employer's business license. Faced with these three choices, any rational employer is likely to terminate *suspected* unauthorized workers en masse.

- The likelihood of defensive firing is a function of flaws in the Act, and would persist regardless of employers' intent. The standards in the Arizona Act—an affidavit attesting that the employer does not employ any unauthorized workers—substantially exceed those established by Congress in 8 USC 1324a(a)(1)(A) (i.e., the prohibition on knowing employment). At the same time, the Act does not include language designed to protect against this type of defensive firing because employers who complied with federal hiring practices would not have a safe harbor from the state-level affidavit requirements, even in the case of employees hired years earlier.

- The problem of defensive firing is also exacerbated by the likelihood that employers will be targeted by spurious complaints given the permissive complaint procedures outline [sic] by the Act, as noted above. It bears emphasis that the Act requires county attorneys to investigate every complaint, and does not include language allowing county attorneys to screen complaints which may be based solely on race, national origins, or ethnicity, or which appear dubious for other reasons.
- Needless to say, the incentives to preemptively terminate *suspected* unauthorized workers will be substantially higher for employers previously convicted of knowing employment, and therefore subject to the "business death penalty" for a second violation. As in the case [. . . .]

5. Additional Considerations

In the Court's 21 December 2007 denial of plaintiffs request for a temporary restraining order, the Court raises several additional issues which merit attention.

A) The Court argues that "[t]hose who suffer the most from unauthorized alien labor are those whom federal and Arizona law most explicitly protect"; and suggests that the Act would provide further protection for these "unskilled, low-wage, sometimes near or under the margin of poverty" workers (page 10).

Yet the overwhelming evidence from IRCA's implementation is that employer sanctions produced downward pressure on wages for exactly this population of workers, as noted above. In addition, given Arizona's demographics, unskilled and low-wage

workers are also disproportionately likely to be affected by employers' defensive hiring and defensive firing decisions, driving down wages among this precise population of vulnerable workers. Low-skilled wages will also suffer as a result of employers' decisions to export many manufacturing jobs to other states or countries. In the worst cases some "bad apple" employers will respond to the Arizona Act by moving some or all of their business to the black market, employing workers off the books to avoid detection. This type of illegal practice is particularly widespread in many of the low-wage construction, agriculture, and service-sector jobs particularly likely to be affected by the Arizona statute.

Thus, if the Arizona legislature is genuinely concerned with protecting the wages and working conditions of its most vulnerable legal workers, at a minimum, the Act should be revised to include far more substantial worker protections and anti-discrimination provisions, as well as a more certain mechanism for workers to appeal TNC's and to identity and protest defensive hiring and firing decisions. In addition, the Act should spell out in greater detail what constitutes a frivolous complaint under § 23-212(B). The Act should also include some mechanism to compensate victims of wrongful termination as a result of the Act, though it is unclear who would pay for these inevitable mistakes.

It also bears emphasis that the Act's positive effect on wages through the reduction of unauthorized employment would likely be quite limited in the absence of broader reforms undertaken at the federal level. On one hand, many jobs in Arizona's service, agriculture, and construction sectors over the course of many decades have become "structurally dependent"

on immigrant labor. That is, for a variety of cultural, economic, and sociological reasons, it is simply not possible to recruit native born workers for certain jobs, even at above-market wages.[37]

On the other hand, unauthorized workers and their employers will independently and together look for and find new and innovative ways to elude enforcement efforts, especially in a state like Arizona with its large existing undocumented population. In the case of undocumented immigrants, the shift to a system which emphasizes electronic verification will likely lead to a substantial increase in identity fraud—fraud which neither the Arizona Act, the Basic Pilot program, nor the procedures in 8 USC 1373 have any mechanism to detect. In the case of "bad apple" employers, unauthorized employment will likely shift off the books to the black market, resulting in lost tax revenues at the state and federal level, and also resulting in a greater likelihood of additional health and safety violations. Indeed, the Act effectively rewards employers for taking this action: given that the only state-level punishment for employment of unauthorized workers is loss of an employer's business license(s), employers may effectively avoid punishment by choosing to operate without a license.

For all of these reasons, there is a broad consensus among policy analysts and current and former migration enforcement officials that the most promising and most efficient strategies for gaining control of undocumented immigration is through a *combination* of enhanced enforcement, more effective admissions policies, and some form of legalization for existing

[37] Cornelius 1998; Tsuda 2003

undocumented immigrants.[38] The whole is far greater than the sum of its parts.

B) The Court argues that plaintiffs' (and by extension Arizona employers') hardship is minimal because the only concrete expense under the Act is the use of the Basic Pilot program, and because Basic Pilot provides workers with opportunities to appeal TNC's (p. 6).

Yet the full costs of compliance with Basic Pilot (E-Verify) are higher than the ruling suggests, including the costs of training human resources personnel, establishing new hiring procedures, establishing internet connections at hiring locations, creating new security systems to safeguard employee data, etc.

These direct costs would be a small fraction of the hidden costs of the Arizona statute, which are harder to estimate precisely. Tens of thousands of lawful workers who are unable to immediately prove their eligibility may be subject to employment delays of several days as a result of database errors in the Basic Pilot system. The costs to businesses and workers of the wrongful termination of these tens of thousands of workers, as well as the defensive non-hiring and defensive firing of many additional tens of thousands of workers would be especially high. For example, roughly 288,000 Arizona workers speak only Spanish, including perhaps 145,000 legal workers who speak no English.[39] It is simply not possible to predict how many of these workers will be wrong-

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[38] See e.g., Meissner et al., Coalition for Immigration Security 2006

[39] US Census Bureau American Community Survey, data provided by Migration Information Source 2007.

fully terminated as a result of the Act, nor the expense employers will go to in order to replace these legal workers.

Ironically, the Act will impose the greatest business expenses on the most conscientious employers. In the absence of a reliable national verification system, employers who comply with the requirements of the Act while taking care not to discriminate on the basis of national origins will be paralyzed by structural uncertainty built into the system. In this way, the Act shifts the burden of immigration enforcement from state and federal agents, where it belongs, on to Arizona employers. This type of cost-shifting unfairly asks Arizona employers to pay for decades of flawed immigration policies at the federal level, and places Arizona employers at a substantial competitive disadvantage relative to employers in other states.

C) The court rejects plaintiffs' claim that federal law preempts the Act because IRCA permits states to impose penalties though licensing and permit laws, and because the Act is not seen as an obstacle "'to the accomplishment and execution of the full purposes and objectives of Congress.'" (pp. 14-17).

Yet the court also asserts that "People disagree whether the great number and continuing flow of unauthorized workers into the United States has more benefits than costs. But no one can disagree that the costs and benefits accrue differently to different people in our society. It is the responsibility of our elected representatives in Congress and in our legislatures to strike the balance among those competing social and economic interests" (p. 9).

It seems clear that the Arizona Act substantially changes the balance that Congress has struck

between the rights of legal workers and employers, and the benefits of migration control. In particular, Congress has debated and *rejected* proposals to make Basic Pilot mandatory for all US employers, leaving the program as a voluntary pilot in its 2003 expansion of the program, and mandating phased implementation in the different proposals considered in 2006 and 2007.[40] In floor debate and in extensive staff-level negotiations in which I participated concerns about inaccuracies in the Basic Pilot databases, poor rates of employer compliance with the system, and high levels of false non-confirmations were repeatedly identified as major obstacles to expanding the Basic Pilot.

Executive branch officials charged with managing the Basic Pilot have repeatedly described a multi-year timeline as necessary for the successful implementation of a universal electronic verification system, citing both infrastructural and personnel changes necessary before the system can accommodate the increased traffic associated with a universal system. In proposals to expand the participation in an electronic verification system Congress also included substantial new worker protections to balance the predictable increase in discrimination associated with new enforcement provisions.[41]

The Arizona Act goes considerably farther than Congress by not only prohibiting the *knowing* employ-

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[40] The House-passed H.R.4437 would have phased mandatory participation in Basic Pilot in over a two-year timeline; The Senate passed S.2611 would have established a default confirmation rule in Basic Pilot until such time as the system was demonstrated to be 99 percent accurate.

[41] See e.g. the provisions in Title III of the Senate-passed S.2611 in 2006; also see GAO 2007.

ment of unauthorized workers, as under federal law, but also by requiring employers who are found to have violated the act to sign an affidavit avowing that they are not employing any unauthorized workers at all—a far higher standard. When combined with the substantially greater penalties under the Arizona Act, including the "business death penalty" for a second violation (as compared with IRCA's modest civil fines for knowingly hiring or employing unauthorized aliens or failing to comply with the I-9 requirements), these higher compliance standards clearly strike a far different balance among these competing priorities than Congress intended under IRCA or has contemplated in more recent legislative debates.

D) Immigration and US Foreign Policy

An additional consideration in the balance between state and federal immigration policymaking—one not considered by the Court in its 21 December 2007 ruling—is the relationship between immigration and US foreign policy. Indeed, while many American policymakers approach immigration issues from a strictly domestic political perspective, political scientists for many years have recognized that immigration policy is the "quintessential intermestic issue" in that policies made in the United States have a direct impact on migration countries of origin; and policymaking abroad likewise has an important effect on outcomes in the United States.[42]

Nowhere is this domestic-international interaction more central to migration or to US foreign policy concerns than in the case of immigration and U.S.-Mexican/US-Caribbean Basin relations. On one hand,

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[42] Lowenthal 1999, p. 124. Also see Manning 1977.

the regional migration relationship is particularly well-developed from both a historical perspective and in terms of the structural migration system in which current flows are embedded.[43] Thus, policymaking to influence U.S.-Mexican and US-Caribbean Basin flows is more challenging than is the case for other migration dyads, and successful management depends more heavily on a degree of bilateral arid regional cooperation. Put simply: Mexico and other countries of origin have substantially greater control over their side of the U.S.-Mexican border than does the United States, and shared regional interests in promoting orderly flows and controlling border area violence create important opportunities for collaborative policymaking.[44]

On the other hand, the density and complexity of U.S.-Mexican and US-regional relations also means that US immigration policy has a direct and important impact on broader US foreign policy goals in the region and throughout the hemisphere. The enhanced importance is partly a function of economic integration per se, i.e., because the effects of US immigration policy on Mexican and regional growth and development rebound throughout the broader US economy. Indeed, for countries like Mexico, El Salvador, and the Dominican Republic, migrant remittances are the single largest source of foreign exchange—exceeding exports and foreign direct investment

Partly for this reason, US immigration policy also has important diplomatic implications for US-Mexican and US-regional relations. Indeed, current and former

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[43] Massey et al. 1998.

[44] Rosenblum 2008.

Mexican and Central. American congressional and executive branch officials have described US and regional migration policies as being top diplomatic priorities, of greater concern, for example, than trade policy or economic assistance packages.[45] Growing U.S.-Mexican economic integration, as well as Mexico's recent democratization and the development of stronger and more globalized transnational communities spanning the two nations have accelerated this tendency in recent years.

For these reasons, especially in the U.S.-Mexican case, the last two decades have been characterized by important efforts to develop new cooperative institutions for managing bilateral and regional migration. During the 1990s, these efforts were led by The U.S.—Mexican Binational Commission, which sponsored a major binational study of immigration in 1994,[46] and which oversaw the development of four separate programs to establish joint procedures for U.S. Border Patrol agents and Mexican consuls during deportation proceedings (Mechanisms of Consultation), standing links between municipal officials along the border (Border Liaison Mechanisms), and a program to target U.S. resources to migrant-sending communities.[47] More recently, Presidents Vicente Fox of Mexico and George W. Bush of the United States announced ambitious plans in 2001 to develop a new binational guest-worker program as part of a broader comprehensive immigration reform strategy. Although these plans were substantially scaled back in the wake of the 9/11 terror attacks, the two countries

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[45] Dominguez and Fernandez de Castro 2001; Rosenblum 2004.

[46] Binational Study on Migration 1997

[47] Rosenblum 2008.

continued to promote an agenda organized around "shared responsibility" after 2001, and have implemented important new security and economic arrangements related to immigration as part of the Partnership for Prosperity program. These existing and ongoing bilateral migration policies are directly threatened by state and local policies which may conflict with federal and binational policymaking efforts.

5. Miscellaneous

I have been paid for my time in preparing this report and will be paid for any time testifying at my standard hourly rate of $225/hour. I have previously testified as an expert witness in the case of *Lozano v. City of Hazleton*, 6-cv-56-JMM (M.D.Pa), and I have also testified before the Immigration Subcommittee of the United States Congress on employment verification matters.

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12/28/2007
Date

References

Archibold, Randal. 2007. Arizona is Split over Hard Line on Immigrants. *The New York Times*. December 14.

Bansak, Cynthia. 2005. "The Differential Wage Impact of the Immigration Reform and Control Act on Latino Ethnic Subgroups." *Social Science Quarterly* 86, 5 (December): 1279-1298.

Borjas, George J., Richard B. Freeman, and Lawrence F. Katz. 1996. "Searching for the Effects of Immigration on the Labor Market." *The American Economic Review* 86, 2 (May): 246-251.

Binational Study on Migration. 1997. *Binational Study on Migration Between Mexico and the United States*. Mexico City: Secretaría de Relaciones Exteriores.

Coalition for Immigration Security. 2006. "Open Letter to Members of Congress." Washington, DC: Coalition for Immigration Security (July 6, 2006).

Christi, Muzaffar. 1995. "Immigration Law: Its Application in the Workplace." *Human Rights: Journal of the Section of Individual Rights & Responsibilities* 22, 1 (Winter): 18-21.

Donato, Katherine M., Jorge Durand, and Douglas S. Massey. 1992. "Stemming the Tide? Assessing the Deterrent Effects of the Immigration Reform and Control Act." *Demography* 29: 139-158.

Dominguez, Jorge I, and Rafael Fernandez de Castro. 2001. *The United States and Mexico: Between Partnership and Conflict*. New York: Routledge Press.

Institute for Survey Research, Temple University, and Westat. 2002. *INS Basic Pilot Evaluation Summary Report*. Washington, DC: Institute for Survey Research.

__. 2006. *Interim Findings of the Web-Based Basic Pilot Evaluation*. Washington, DC: Institute for Survey Research.

Jordan, Miriam. 2007. "Arizona Squeeze on Immigration Angers Businesses," *The Wall Street Journal*. December 14, p. B1.

Lowenthal, Abraham. 1999. "U.S.-Latin American Relations at the Century's End: Managing the 'Intermestic' Agenda." In Albert Fishlow and James Jones, eds., *The United States and the Americas: A Twenty-First Century View*. New York: W. W. Norton: pp. 109-136.

Manning, Bayless. 1977. "The Congress, the Executive, and Intermestic Affairs: Three Proposals," *Foreign Affairs* 55: 306-24.

Massey, Douglas S., Jorge Durand, and Nolan J. Malone. 2002. *Beyond Smoke and Mirrors: Mexican Immigration in an Era of Free Trade*. New York: Russell Sage Foundation.

Massey, Douglas S., Joaquín Arango, Graeme Hugo, Ali Kouaouci, Adela Pellegrino, and J. Edward Taylor. 1998. *Worlds in Motion: International Migration at the End of the Millennium*. Oxford: Oxford University Press.

Meisner, Doris, Deborah W. Meyers, Demetrios Papademtriou, Michael Fix. 2006. *Immigration and America's Future: A New Chapter*. Washington, DC: Migration Policy Institute.

Moran, Tyler. 2007. "Employment Eligibility Verification Systems." Testimony before the House Committee on Ways and Means, Subcommittee on Social Security. June 7, 2007. Available at: http://waysandmeans.house.gov/hearings.asp?formmode—view & id=6099.

Napolitano, Janet. 2007. "Letter to the Honorable Jim Weiers." July 2, 2007.

Neumann, Peter. "Testimony Before the Subcommittee on Social Security of the House Committee on Ways and Means." Washington, DC: June 07, 2007. Available at: http://waysandmeans.house.gov/hearings.as?formmode=view&id=6099.

Privacy Rights Clearinghouse. 2007. "How Many Identity Theft Victims Are There? What is the Impact on the Victims?" Available at: http://www.privacyrights.org/ar/idtheftsurveys.htm.

Raphael, Stephen. 2001. "Immigration Reform and the Earnings of Latino Workers: Do Employer Sanctions Cause Discrimination?" *Industrial and Labor Relations Review.*

Rosenblum, Marc R. 2004. "Beyond the Policy of No Policy: Emigration from Mexico and Central America," *Latin American Politics and Society* 4, 1: 91-125.

__. Marc R. Rosenblum. 2007. "Problems in Current Employment Verification and Worksite Enforcement." Testimony before the House Judiciary Committee's Subcommittee on Immigration, Citizenship, Refugees, Border Security, and International Law. Washington DC; April 24, 2007. Available at http://judiciary.house.gov/Oversight.aspx?ID=302.

__. 2008. "U.S.-Mexican Immigration Policymaking: Opportunities and Obstacles to Collaboration." In Pia Orrenius and James Hollifield, eds. *Migration, Trade, and Development*. Dallas: Federal Reserve Bank.

Shandley, John W. 2007. "Problems in the Current Employment Verification and Worksite Enforce-

ment System." Testimony before the House Judiciary Committee's Subcommittee on Immigration, Citizenship, Refugees, Border Security, and International Law. Washington DC; April 24, 2007. Available at http://judiciary.house.gov/Oversight.aspx?ID=302.

US Department of Homeland Security. 2007. *Fact Sheet* (August 9, 2007). Washington, DC: USDHS.

US Citizenship and Immigration Service. 2004. *Report to Congress on the Basic Pilot Program*. Washington, DC: USCIS.

US General Accounting Office. 1990. *Immigration Reform: Employer Sanctions and the Question of Discrimination*. Washington, DC: GAO.

__. 2006a. *Immigration Enforcement: Weaknesses Hinder Employment Verification and Worksite Enforcement Efforts*. Washington, DC: GAO.

__. 2006b. *Immigration Benefits: Additional Efforts Needed to Help Ensure Alien Files Are Located When Needed* GAO 07-85. Washington, DC: GAO.

__. 2007. *Employment Verification: Challenges Exist in Implementing a Mandatory Electronic Verification System* GAO-07-924T. Washington, DC: GAO.

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Fall 2000 — July 2005	Assistant Professor of Political Science, Univ. of New Orleans
Fall 1999 — Fall 2000	Asst. Director, UCSD Ctr. for Comparative Immigration Studies

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Ph.D. Spring 2000	Political Science University of California, San Diego
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Publications

Books and Monographs

Marc R. Rosenblum. 2004. *The Transnational Politics of U.S. Immigration Policy*. La Jolla, CA: University of California, San Diego Center for Comparative Immigration Studies. 129 pp.

Journal Articles

Idean Salehyan and Marc R. Rosenblum. 2008. "International Relations, Domestic Politics, and Asylum Admissions in the United States." *Political Research Quarterly*. Forthcoming.

Christine L. Day and Marc R. Rosenblum. 2006. "The Politics of Katrina in New Orleans: A View from Ground Zero." *The Forum* 3, 4: 1-10.

Marc R. Rosenblum. 2006. "The Price of Indifference vs. the Price of Reform: Review Essay on Arthur Helton's *The Price of Indifference*." *Human Rights Review* 7, 1: 111-126.

Wayne Cornelius and Marc R. Rosenblum. 2005. "Immigration and Politics." *Annual Review of Political Science* 8: 99-119.

Marc R. Rosenblum and Idean Salehyan. 2004. "Norms and Interests in U.S. Asylum Enforcement." *Journal of Peace Research*. 41, 6: 677-697.

Marc R. Rosenblum. 2004. "Beyond the Policy of No Policy: Emigration from Mexico and Central America." *Latin American Politics and Society* 4, 1: 91-125.

Marc R. Rosenblum. 2003. "The Intermestic Politics of Immigration Policy: Lessons from the Bracero Program." *Political Power and Social Theory* 16: 139-182.

Marc R. Rosenblum. 2003. "The Political Determinants of Migration Control: A Quantitative Analysis." *Migraciones Internacionales* 2, 1 (January—June): 161-170.

Marc R. Rosenblum. 1998. "My Neighbor, Myself: Mexican Influence on U.S. Migration Policy." *Journal of International Law and Foreign Affairs* 3, 2 (Fall-Winter): 527-556.

Eric Magar, Marc R. Rosenblum, and David Samuels. 1998. "On the Absence of Centripetal Incentives in Double-Member Districts: The Case of Chile." *Comparative Political Studies*. 31, 6 (December): 714-739.

Professional Testimony

Marc R. Rosenblum. 2007. "Problems in Current Employment Verification and Worksite Enforcement." Testimony before the House Judiciary Committee's Subcommittee on Immigration, Citizenship, Refugees, Border Security, and International Law. Washington DC; April 24, 2007.

Marc R. Rosenblum. 2007. "Report of Expert Marc R. Rosenblum, Ph.D." *Lozano v. City of Hazleton*, 6-cv-56-JMM (M.D.Pa). Scranton, PA; March 15, 2007.

Book Chapters

Marc R. Rosenblum. 2008. "Immigration and US Interests: Change and Continuity since the 9/11 Attacks." In Gary Freeman, David Leal, and Terri Givens, eds. *Immigration and Refugee Policy in a Post-9/11 World*. New York: Palgrave. Forthcoming.

Marc R. Rosenblum. 2008. "Immigration Policy: US-Mexican Relations Confront US Political Realities" In Ralph Carter, ed. *Contemporary Cases in U.S. Foreign Policy: From Terrorism to Trade* 3rd ed. Washington, DC: CQ Press. Pages 217-247.

Marc R. Rosenblum. 2008. "U.S.-Mexican Immigration Policymaking: Opportunities and Obstacles to Collaboration." In Pia Orrenius and James Hollifield, eds. *Migration, Trade, and Development.* Dallas: Federal Reserve Bank. Forthcoming.

Marc R. Rosenblum. 2008. "US Immigration Reform: Can the System Be Repaired?" In Sujatha Dorna, ed. *Migrant Workers.* Hyderbad, India: Icfai University Press. Forthcoming.

Marc R. Rosenblum. 2007. "El Salvador." In Karl DeRouen and Uk Heo, eds. *Civil Wars since 1980.* Santa Barbara, CA: ABC-CLIO. Pages 389-405.

Marc R. Rosenblum. 2006. "Reforma Migatoria en Estados Unidos: Perspectivas e Implicaciones para Mexico." In Roger Díaz de Cosio, ed. *Los Mexicanos de Aquí y de Allá: Problemas Comunes. Memoria del Segundo Foro de Reflexión Binacional.* Mexico City: Fundación Solidaridad Mexicano Americana Pages 53-72.

Marc R. Rosenblum. 2005. "Mexico." In Karl DeRouen and Uk Heo, eds. *Defense and Security: A Compendium of National Armed Forces and Security Policies*, vol. 1. Santa Barbara, CA: ABC-CLIO. Pages 463-486.

Marc R. Rosenblum. 2001. "Conclusion: High-Skilled Immigration and the U.S. National Interest." In Wayne A. Cornelius and Thomas J. Espenshade, eds. *The International Migration of the Highly Skilled: Demand, Supply, and Developmental Consequences.* La Jolla, CA: Center for Comparative Immigration Studies, University of California, San. Diego. Pages 373-400.

Marc R. Rosenblum. 2001. "International Politics and Immigration." In James Ciment, ed., *Encyclopedia of American Immigration*. Armonk, NY: M.E. Sharpe, Inc. Vol. 3. Pages 1001-7.

Policy Briefs

Marc R. Rosenbhun. 2006. "Fixing a Broken System: An Analysis of Refolin Proposals for Employment-Based Immigration." Washington, DC: Migration Policy Institute. Policy Brief #13.

Marc R. Rosenblum. 2005. "Immigration Enforcement at the Worksite: Making it Work." Washington, DC: Migration Policy Institute. Policy Brief #6.

Marc R. Rosenblum. 2005. "The Guest-worker Approach to U.S. Immigration Reform." San Diego: University of San Diego Trans-Border Institute. Policy Brief #3. http://www.sandiego.edu/tbi/pdfs/TBI_Rosenblumbi_brief.pdf

Marc R. Rosenblum. 2000. "U.S. Immigration Policy: Unilateral and Cooperative Responses to Undocumented Immigration." La Jolla., CA: Institute on Global Conflict and Cooperation. Policy Paper #55.

Other Publications

Marc R. Rosenblum. 2008. "Internet Module: Immigration Policy." CQ Press web-based teaching module to accompany *Contemporary Cases in U.S. Foreign Policy: From Terrorism to Trade* 3rd ed. Forthcoming.

Marc R. Rosenblum and Bruce Fein. 2007. "A 'Path to Citizenship' for Current Illegal Immigrants?" *Council on Foreign Relations Online Debate*. Council on Foreign Relations. http://www.cfr.org/publication/12971/path__to__citizenship__for__current__illegal immigrants.html.

Marc R. Rosenblum. 2007. "The United States and Mexico: Prospects for a Bilateral Migration Policy." *Border Battles: The US Immigration Debates.* Social Science Research Council. http://borderbattles.ssrc.org/Rosenblum/.

Marc. R. Rosenblum. 2006. "US Immigration Policy: Can the System Be Repaired?" *UCSD Center for Comparative Immigration Studies* Working Paper #132.

Marc R. Rosenblum. 2006. "Book Review: Wayne A. Cornelius, et al., eds. *Controlling Immigration: A Global Perspective." American Review of Politics* 27: 169-172.

Wayne Cornelius and Marc R. Rosenblum. 2005. "Immigration and Political Science." *Newsletter of the American Political Science Association Organized Section in Comparative Politics* Vol. 16, No. 1 pp. 3, 31.

Wayne A. Cornelius and Marc R. Rosenblum. 2004. "Immigration and Politics." *UCSD Center for Comparative Immigration Studies* Working Paper #105.

Marc R. Rosenblum. 2002. "The Texas Proviso." In Lee Stacy and Gordon Leney, eds. *Mexico and the United States.* New York: Marshall Cavendish. Page 811.

Marc R. Rosenblum. 2002. "Illegal Immigration." In Lee Stacy and Gordon Leney, eds. *Mexico and the United States.* New York: Marshall Cavendish. Pages 409-410.

Marc R. Rosenblum. 2002. "Beyond the Policy of No Policy." *UCSD Center for Comparative Immigration Studies* Working Paper #54.

Marc R. Rosenblum. 2001. "Book Review: Ian Shapiro and Stephen Macedo, eds. *Designing Democratic Institutions.*" *American Review of Politics* 22 (Spring): 143-7.

Newspaper Opinion Pieces

Marc R. Rosenblum. 2005. "Rebuilding Quickly vs. Rebuilding Wisely." *The New Orleans Times-Picayune*. Wednesday September 28. On-line edition.

Marc R. Rosenblum. 2004. "Why Blame Must Go to the Top." *New Orleans Times-Picayune*. Saturday, May 22. Page B-7.

Marc R. Rosenblum. 2003. "A Coalition of the Willing is not Enough." *New Orleans Times-Picayune*. Monday, March 17. Page B-7.

Marc R. Rosenblum. 2002. "Beware the Pitfalls of Going it Alone." *New Orleans Times-Picayune*. Monday, October 7. Page B-5.

Marc R. Rosenblum. 2002. "Will We Keep a Failed Cuba Policy?" *New Orleans Times-Picayune*. Sunday, May 19. Page B-7.

Marc R. Rosenblum. 2000. "Hand Recount Must Be Allowed to Go On in Florida." *New Orleans Times-Picayune*. Saturday, November 18. Page B-7.

Current Projects

Marc R. Rosenblum. *Defining Migration: America's Great Debate and the History of US Immigration Policy*. Book ms. in process.

Marc R. Rosenblum and Daniel J. Tichenor, eds. *Oxford Handbook of International Migration*. Oxford University Press. Under Contract.

Marc R. Rosenblum. "Immigration." *In The Encyclopedia of US Political History*, vol. 3. Washington, DC: CQ Press. Under Contract.

Honors and Awards (last 5 years)

2007 University of New Orleans, Robert Dupuy Professor of Pan-American Studies

2006 Columbia University American Assembly, Next Generation Fellowship

2005 Council on Foreign Relations, International Affairs Fellowship

2005 University of New Orleans, University-wide Early Career Achievement Award

2004 University of New Orleans, College of Liberal Arts. Summer Research Fellowship

2003 Pi Sigma Alpha Award for best paper (with Xinmin Liu and Michael Huelshoff). Annual meeting of the Southwestern Political Science Association, San Antonio, Texas.

2002 University of New Orleans, College of Liberal Arts: Travel grant

Papers Presented (last 5 years)

Colloquia

"Policy vs. Politics: The Immigration Debate of 2005-06." Council on Foreign Relations International Affairs Fellows Conference. New York, May 4, 2007.

"U.S.-Mexican Migration Cooperation: Obstacles and Opportunities." Conference on *Migration, Trade, and Development* hosted by the Federal Reserve Bank of Dallas, the Tower Center for Political Studies and the Department of Economics at Southern

Methodist University, and the Jno E. Owens Foundation. Dallas, TX, October 6, 2006.

"Politics and the National Interest: The Paradox of US Immigration Policy." Junior Faculty Colloquium Series in International Political Economy, Columbia University Department of Political Science. New York, NY, May 1, 2006.

"Immigration and the US National Interest Before and after 9/11." Europe and the United States: Immigration and the 9/11 Attacks. University of Texas at Austin, LBJ School of Public Policy. Austin, Texas, March 3, 2006.

"US Immigration Policy: Can the System be Repaired." Research Seminar jointly sponsored by the UCSD Center for Comparative Immigration Studies, the UCSD Institute for International, Comparative, and Area Studies (IICAS), and the California Western School of Law. San Diego, CA, January 17, 2006.

"The Costs and Benefits of Immigration to the United States." Presentation to the National Programmers Workshop sponsored by Catholic University of America (CUA), the Office of International Visitors, and the National Program Agencies (NPA). Washington, DC. December 9, 2005.

"Reforma Migratoria en Estados Unidos: Perspectivas e Implicaciones para México." Presented at *The Second Forum on Binational Reflection: Mexicans from Here and There: Common Problems*. Sponsored by the Senate of the Republic of Mexico and Mexico-America Solidarity Foundation. Mexico City, October 26, 2005.

"Evaluating the Prospects for a Migrant Guest-worker Initiative." Luncheon and Policy Brief Co-Sponsored

by the SDSU Center for Latin American Studies (CLAS), the USD Trans-Border Institute (TBI), and the UCSD Center for Comparative Immigration Studies (CCIS). San Diego, CA., April 4, 2005.

"Immigration and Globalization." Tulane University Honors Colloquium on Globalization. New Orleans, LA, November 10, 2004.

"Elite Attitudes about Trade and Immigration in Mexico and Central America." Paper presented in joint colloquium of the UCSD Center for U.S.-Mexican Studies and the UCSD Center for Comparative Immigration Studies. San Diego, CA, May 22, 2002.

Academic Conferences

"The 2006 Immigration Debate: Issues and Prospects for Legislation." U.C. California Conference on Immigration Reform and Agriculture. June 14, 2006, Washington DC.

"Immigration and the US National Interest Before and after 9/11." Presentation to Conference, Europe and the United States: Immigration and the 9/11 Attacks. University of Texas at Austin, LBJ School of Public Policy. Austin, Texas, March 3, 2006.

"Congress, the President, and the Two-Level Politics of U.S. Migration Policy." Paper presented at the 77th annual meeting of the Southern Political Science Association. January 5, 2006.

"Congress, the President, and the Two-Level Politics of U.S. Migration Policy." Paper presented at the 100th annual meeting of the APSA. Chicago, IL. August 30-September 4, 2004.

"Political Parties in New Democracies: Learning, Wealth, or Context?" (with Michael Huelshoff). Paper

presented at the annual meeting of the Midwest Political Science Association. Chicago, IL, April 15-18, 2004.

"Institutional Factors, Structural Factors, and the Number of Parties: A Critical Examination of Traditional Wisdom and a Cross-national Analysis" (with Xinmin Liu and Michael Huelshoff). Paper presented at the annual meeting of the Southwestern Political Science Association. San Antonio, Texas, April 16-19, 2003.

"The Political Economy of Immigration Control in Fifteen OECD States" Paper presented at the 2003 meeting of the International Studies Association. Portland, OR March, 2003.

"Congress, the President, and the INS: Who's in Charge of U.S. Immigration Policy?" Paper presented at the 98th annual meeting of the APSA. Boston, MA. August 29-September 1, 2002.

"Presidential Shirking and Immigration Enforcement: A Quantitative Analysis." Paper presented at the 2002 meeting of the International Studies Association. New Orleans, LA. March 24-7, 2002.

"U.S. Asylum Enforcement: A Test of Globalization, Realist, and Liberal Hypotheses." (Co-authored with Idean Salehyan.) Paper presented at the annual meeting of the International Studies Association. New Orleans, LA. March 24-7, 2002.

Other Speaking Engagements

"US Congressional Staff Briefing: Employment Eligibility Verification System." Washington, DC, September 21, 2007.

"The Congressional Politics of US Immigration Policy." Tulane University Summer Teachers Institute. New Orleans, July 13, 2007.

"Immigration and the US Interests: Good politics vs. Good Policy." World Affairs Council of New Orleans. New Orleans, LA May 9, 2007.

"Immigration, US Interests, and Legislative Options." Senate Presidents' Forum. Bonita Springs, Florida, January 11-14, 2007.

"The 2006 Immigration Debate: Issues and Prospects for Legislation." U.C. California Conference on Immigration Reform and Agriculture. Washington DC, June 14, 2006.

"Immigration and the US National Interest." US Department of State, Bureau of Intelligence and Research. Arlington, Virginia, April 20, 2006.

"Immigration and US Foreign policy." Presentation to the Young Professionals in Foreign Policy. Washington, DC. November 10, 2005.

"Diasporas and U.S. Foreign Policy." Keynote address presented at *The World in Canada: Demographics, Diversity & Domestic Politics in Canadian Foreign Policy*. Sponsored by the Canadian Defense and International Affairs Institute. Ottawa. November 1, 2005.

"Globalization and U.S. Immigration." Presentation to the New Orleans Society for Secular Humanism. February 20, 2005.

"Jews in American Politics." Presentation to the Gates of Prayer Synagogue, Continuing Education Series. January 23, 2005.

Academic Service (last 5 years)

Panel chair. "REAL ID and Habeas Corpus." Catholic University Law School Symposium on Immigration Appeals and Judicial Review. Washington, DC, January 30, 2006.

Organizer, *Latino Politics and Culture into the 21st Century*. Six-session speaker series at UNO, spring 2004.

Member, University of New Orleans Faculty Advisory Committee, Bachelors of Arts in International Affairs (2004 - present)

Member, University of New Orleans Committee for the Creation of an Interdisciplinary American Cultures Ph.D. in the College of Liberal Arts (2002-04)

Member, University of New Orleans Committee for the Creation of an Interdisciplinary Minor in Peace and Social Justice Studies (2002-04)

Campus Representative, Inter-University Consortium for Political and Social Research (2002- present)

Reviewer, *American Journal of Political Science, International Organization, Comparative Political Studies, International Migration Review, Ethics and International Affairs, American Review of Politics, Journal of Political Psychology, Journal of Training and Development, Migraciones Internacionales*

Member, *Phi Beta Delta Honor Society, American Political Science Association, Midwest Political Science Association, Latin American Studies Association, International Studies Association, Southeastern Conference on Latin American Studies.*

Other Service

Board Member. International School of Louisiana (public charter school). October 2006 - present. (Secretary, August 2007 - present)

Member of Executive Board. International School of Louisiana Family, Teacher, and Community Organization (PTO), June 2004 — June 2005.

President, International School of Louisiana Family, Teacher, and Community Organization (PTO), May 2003-June 2004.

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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

[Filed: 01/24/2008]

No. CV 07-2496-PHX-NVW
(Consolidated-Lead)
CV 07-2518-PHX-NVW
(Consolidated)

ARIZONA CONTRACTORS ASSOCIATION INC., an Arizona nonprofit corporation, et al.,
Plaintiffs,

vs.

Criss Candelaria, et al.,
Defendants.

Valle Del Sol, Inc., et al.,
Plaintiffs,

vs.

Terry Goddard, et al.,
Defendants.

Phoenix, Arizona
January 16, 2008
1:30 p.m.

BEFORE: THE HONORABLE NEIL V. WAKE
UNITED STATES DISTRICT JUDGE

(*Bench Trial*)
(*Injunction Hearing*)

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[4] PROCEEDINGS

THE COURT: All right. Please be seated.

THE COURTROOM DEPUTY: Civil Case CV 07-2496, Arizona Contractors Association versus Criss Candelaria, et al., on for trial and injunction.

Counsel, please announce.

MR. SELDEN: David Selden with Ballard Spahr Andrews & Ingersoll. With me is Lou Moffa and Heidi Nunn-Gilman, appearing for plaintiff, Arizona Contractors Association, Arizona Employer's Immi-

gration Reform, Chamber of Commerce of the United States, Arizona Chamber of Commerce, Arizona Hispanic Chamber of Commerce, Arizona Farm Bureau Federation, Arizona Restaurant and Hospitality Association, Associated Minority Contractors of America, Arizona Roofing Contractors Association, National Roofing Contractors Association and the Arizona Landscape Contractors Association.

MR. ECKSTEIN: Good afternoon, Your Honor. Paul Eckstein, Joel Nomkin, and Chuck Blanchard, Perkins, Coie, Brown and Bain, for plaintiff Wakeup! Arizona.

MR. WEISSGLASS: Good afternoon, Your Honor. Jonathan Weissglass for the Valle Del Sol plaintiffs. With me at counsel table are Daniel Pochoda, Karen Tumlin, Kristina Campbell, and Omar Jadwat.

MS. O'GRADY: Mary O'Grady and Chris Munns from the Attorney General's Office representing attorney general Terry [5] Goddard, Director of the Department of Revenue Gale Garriott, and Fidelis Garcia, Arizona Registrar of Contractors.

MS. GILBRIDE: Good morning, Your Honor. Eileen Dennis GilBride for the Maricopa County Attorney.

MR. HALL: Afternoon, Your Honor. Roger Hall from Buckley King representing county attorneys for Apache, Cochise, Gila, Graham, Greenlee, La Paz, Mohave, Navajo, Santa Cruz, and Yavapai Counties.

MR. LESSLER: Good afternoon, Your Honor. Mike Lessler appearing for defendant Terrence C. Hance, Coconino County Attorney.

MR. JURKOWITZ: Daniel Jurkowitz appearing on behalf of Pima County Attorney, Barbara LaWall.

MR. ROLL: Chris Roll appearing on behalf of James P. Walsh, Pinal County Attorney.

THE COURT: Good afternoon, counsel.

This is the time set for final trial on the merits. And pursuant to the stipulation of the parties which the Court has accepted, the case will be submitted on the written submissions without live testimony.

I want to ask counsel to give me a brief, each of you, brief preview of how you want to proceed, and in particular, about how much time you would like to take for initial presentation. And part of that question includes whether plaintiffs or defendants have made any divisions of labor with

* * * *

[71] that Your Honor is going through about whether they come down to the same thing, then why isn't the basis the E-Verify determination as opposed to the 1373 determination?

I don't think that the state really meant that these two things were the same. I don't think that the record supports it.

THE COURT: They will not be the same if the employer foregoes E-Verify, or they may not be the same. They could be the same. They could be different. It's only if the employer complies with the purported obligation to participate in the E-Verify that the E-Verify database will be cleaned up at the end of the process and will, therefore, in all likelihood, be reported the same later on in the 1373(c) requests.

So that's why it looks like the mandatory participation in E-Verify is the linchpin on which everything in this statute seems to hang, both in terms of effective deterrence, fair notice, opportunity to avoid sanctions, and under one view of what is necessary

fair procedure there is another view, the one I articulated a couple weeks ago.

MR. WEISSGLASS: Right. I certainly agree E-Verify is very important to the statutory scheme. I don't think it fulfills the due process prerequisite. I guess that's my fundamental point.

THE COURT: Can I ask you—I don't want to shift if there's more you want to say on that.

* * * *

[122] CERTIFICATE

I, LAURIE A. ADAMS, do hereby certify that I am duly appointed and qualified to act as Official Court Reporter for the United States District Court for the District of Arizona.

I FURTHER CERTIFY that the foregoing pages constitute a full, true, and accurate transcript of all of that portion of the proceedings contained herein, had in the above-entitled cause on the date specified therein, and that said transcript was prepared under my direction and control.

DATED at Phoenix, Arizona, this 24th day of January, 2008.

/s/ Laurie A. Adams
Laurie A. Adams, RMR, CRR

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

[Filed: 02/07/08]

No. CV07-02496-PHX-NVW (lead)
No. CV07-02518-PHX-NVW (member)

ARIZONA CONTRACTORS ASSOCIATION, INC., an Arizona non-profit corporation; ARIZONA EMPLOYERS FOR IMMIGRATION REFORM, INC., an Arizona non-profit corporation; CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA, a Washington D.C. non-profit corporation; ARIZONA CHAMBER OF COMMERCE, an Arizona non-profit corporation; ARIZONA HISPANIC CHAMBER OF COMMERCE, INC., an Arizona non-profit corporation; ARIZONA FARM BUREAU FEDERATION, an Arizona non-profit corporation; ARIZONA RESTAURANT AND HOSPITALITY ASSOCIATION, an Arizona non-profit corporation; ASSOCIATED MINORITY CONTRACTORS OF AMERICA, an Arizona non-profit limited liability company; ARIZONA ROOFING CONTRACTORS ASSOCIATION, an Arizona non-profit corporation; NATIONAL ROOFING CONTRACTORS' ASSOCIATION, an Illinois not-for-profit corporation; WAKE UP ARIZONA! INC., an Arizona non-profit corporation; and ARIZONA LANDSCAPE CONTRACTORS ASSOCIATION, INC., an Arizona non-profit corporation,

Plaintiffs,

vs.

CRISS CANDELARIA, Apache County Attorney; ED RHEINHEIMER, Cochise County Attorney; TERENCE C. HANER, Coconino County Attorney; DAISY FLORES,

Gila County Attorney; KENNY ANGLE, Graham County Attorney; DEREK D. RAPIER, Greenlee County Attorney; MARTIN BRANNAN, LaPaz County Attorney; ANDREW P. THOMAS, Maricopa County Attorney; MATTHEW J. SMITH, Mohave County Attorney; JAMES CURRIER, Navajo County Attorney; BARBARA LAWALL, Pima County Attorney; JAMES P. WALSH, Pinal County Attorney; GEORGE SILVA, Santa Cruz County Attorney; SHEILA POLK, Yavapai County Attorney; JON SMITH, Yuma County Attorney; TERRY GODDARD, Attorney General of the State of Arizona; and FIDELIS V. GARCIA, Director of the Arizona Registrar of Contractors,

Defendants.

VALLE DEL SOL, INC.; CHICANOS POR LA CAUSA, INC.; and SOMOS AMERICA,

Plaintiffs,

vs.

TERRY GODDARD, in his official capacity as Attorney General of the State of Arizona; GALE GARRIOTT, in his official capacity as the Director of the Arizona Department of Revenue; and ANDREW THOMAS, in his official capacity as Maricopa County Attorney,

Defendants.

JUDGMENT IN A CIVIL CASE

___ Jury Verdict. This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

_X_ Decision by Court. This action came for consideration before the Court. The issues have been considered and a decision has been rendered.

IT IS ORDERED AND ADJUDGED that pursuant to the Court's order filed February 7, 2008, Defendant Terry Goddard is dismissed without prejudice for lack of subject matter jurisdiction. Judgment is entered in favor of all remaining defendants and against plaintiffs. Plaintiffs to take nothing, and complaint and action are dismissed.

RICHARD H. WEARE
District Court Executive/Clerk

February 7, 2008

/s/ Sally Turner
By: Deputy Clerk

PETITIONER'S BRIEF

Supreme Court, U.S.
FILED
SEP 01 2010
OFFICE OF THE CLERK

No. 09-115

IN THE

Supreme Court of the United States

CHAMBER OF COMMERCE
OF THE UNITED STATES OF AMERICA *et al.*,
Petitioners,

v.

CRISS CANDELARIA *et al.*,
Respondents.

On Writ of Certiorari
to the United States Court of Appeals
for the Ninth Circuit

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QUESTIONS PRESENTED

1. Whether an Arizona statute that imposes sanctions on employers who hire unauthorized aliens is invalid under a federal statute that expressly "preempt[s] any State or local law imposing civil or criminal sanctions (other than through licensing and similar laws) upon those who employ, or recruit or refer for a fee for employment, unauthorized aliens." 8 U.S.C. § 1324a(h)(2).

2. Whether the Arizona statute, which requires all employers to participate in a federal electronic employment verification system, is preempted by a federal law that specifically makes that system voluntary. 8 U.S.C. § 1324a note.

3. Whether the Arizona statute is impliedly preempted because it undermines the "comprehensive scheme" that Congress created to regulate the employment of aliens.

PARTIES TO THE PROCEEDING

Petitioners, which were plaintiffs/appellants below, are Chamber of Commerce of the United States of America; Arizona Contractors Association; Arizona Chamber of Commerce; Arizona Employers for Immigration Reform; Arizona Farm Bureau Federation; Arizona Hispanic Chamber of Commerce; Arizona Landscape Contractors Association; Arizona Restaurant and Hospitality Association; Arizona Roofing Contractors Association; Associated Minority Contractors of America; Chicanos Por La Causa; Somos America; Valle Del Sol, Inc.; National Roofing Contractors Association; and Wake Up Arizona! Inc.

Respondents, who were defendants/appellees below, are Criss Candelaria; Kenny Angle; Melvin R. Bowers Jr.; Martin Brannan; James Currier; Daisy Flores; Fidelis V. Garcia; Gale Garriott; Terry Goddard; Terrence Haner; Barbara Lawall; Janet Napolitano; Sheila Polk; Derek D. Rapier; Ed Rheinheimer; George Silva; Jon Smith; Matthew J. Smith; Andrew P. Thomas; and James P. Walsh.

There are no parent corporations or publicly held corporations that own 10% or more of the stock of any of Petitioners.

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S. Rep. No. 104-249 (1996) 49

SCHOLARLY AUTHORITY

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OTHER AUTHORITIES

Arizona Legislative Bill Drafting Manual (2009), *available at* http://www.azleg.gov/alisPDFs/council/2010%20Bill%20Drafting%20Manual.pdf 28
Business Licenses by Agency or Department, https://az.gov/app/license/bus.xhtml (last visited Aug. 31, 2010) 28
Oxford English Dictionary (2d ed. 1989) 27
Statement of the President Upon Signing S. 1200, Nov. 10, 1986, *reprinted in* 1986 U.S.C.C.A.N. 5856-1 4
Random House Webster's Unabridged Dictionary (1993) 27
Webster's Third New International Dictionary (1993) 27
DHS, *Report to Congress on the Basic Pilot Program* (June 2004), *available at* http://www.nilc.org/immsemplymnt/ircaempverif/basicpilot_uscis_rprt_to_congress_2004-06.pdf 9

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OPINIONS BELOW

The opinions of the United States District Court for the District of Arizona are published at 534 F. Supp. 2d 1036 and 526 F. Supp. 2d 968, and reproduced at Pet. App. 49a-94a, 95a-126a. The Ninth Circuit's opinion is published at 544 F.3d 976, and reproduced at Pet. App. 26a-48a. The Ninth Circuit's order amending its opinion, and denying rehearing and rehearing en banc, is published at 558 F.3d 856, and reproduced at Pet. App. 1a-25a.

JURISDICTION

The Ninth Circuit entered judgment on September 17, 2008, and denied a timely petition for rehearing and rehearing en banc on March 9, 2009. On June 2, 2009, Justice Kennedy granted an extension of time to and including July 24, 2009, to file a petition for a writ of certiorari. The petition was filed on July 24, 2009, and granted on June 28, 2010. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS

The Supremacy Clause provides that "the Laws of the United States ... shall be the supreme Law of the Land ... any Thing in the Constitution or Laws of any State to the Contrary notwithstanding." U.S. Const. art. VI, cl. 2.

Relevant provisions of the Immigration Reform and Control Act of 1986 (IRCA), Pub. L. No. 99-603, 100 Stat. 3359, codified at 8 U.S.C. § 1324a and § 1324b, are reproduced at Pet. App. 127a-147a and at Add1-Add15 of the addendum to this brief. Relevant provisions of the pre-amendment version of the Migrant and Seasonal Agricultural Worker Protection Act, co-

dified at 29 U.S.C. §§ 1801-1816, 1851-1863, and 1871-1872 (1985), as well as the conforming amendments in IRCA § 101(b), are reproduced at Add16-Add38 of the addendum. Relevant provisions of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), Pub. L. No. 104-208, 110 Stat. 3009-546, set forth in a note to 8 U.S.C. § 1324a, are reproduced at Pet. App. 147a-168a.

Relevant provisions of the Legal Arizona Workers Act (LAWA), Ariz. Rev. Stat. §§ 23-211 to -216 (2009), and recent amendments to certain of those provisions, are reproduced at Pet. App. 169a-192a and at Add39-Add41 of the addendum.

STATEMENT OF THE CASE

In IRCA, Congress created a comprehensive scheme for regulating the employment of aliens, including the methods by which to verify a job applicant's eligibility for employment. It balanced multiple, sometimes competing, objectives: deterring illegal immigration, protecting applicants from discrimination, accommodating privacy concerns, and minimizing burdens on employers. This scheme was intended to be "uniform[ ]," IRCA § 115, and exclusive of state regulation: Congress broadly and expressly preempted state laws that regulate the employment of unauthorized workers, 8 U.S.C. § 1324a(h)(2), and imposed precise sanctions for violations of federal law, *id.* § 1324a(e), (f). Congress left a narrow exception for sanctions imposed "through licensing and similar laws," *id.* § 1324a(h)(2), which serves the limited purpose of preserving aspects of traditional state and local licensing authority.

Arizona has done precisely what federal law says it cannot. Using the "licensing" exception as its own license to regulate, it has enacted a statute that does

not remotely resemble a licensing law, nor any traditional exercise of licensing authority. Rather, the "Legal Arizona Workers Act" is a regime by which the State purports to regulate and enforce employment status verification. It authorizes state officials to adjudicate employment eligibility. It imposes sanctions more severe than those carefully calibrated by federal law, including withdrawal of a company's charters and articles of incorporation—the "business death penalty," as the then-Arizona governor accurately described it. J.A. 399. This separate system of regulating and enforcing work-status authorization is utterly unlike the very limited state licensing authority that Congress meant to preserve, and is expressly preempted by and conflicts with the federal system enacted by Congress.

Confirming the extraordinary nature of Arizona's overreach, the State has arrogated to itself the power to mandate participation in a federal verification system that Congress repeatedly and explicitly has declared to be voluntary. At a minimum, Arizona has undermined Congress's objectives in adopting and enacting a non-mandatory verification system.

A. Federal Regulation Of Immigration.

This Court long has recognized that most questions involving immigration are regulated exclusively by the federal government. *Hines* v. *Davidowitz*, 312 U.S. 52, 60-62 (1941). One exception used to be the employment of aliens. Prior to 1986, it could fairly be said that federal law (in the form of the then-controlling Immigration and Nationality Act, ch. 447, 66 Stat. 163 (1952)) had only "a peripheral concern with employment of illegal entrants." *De Canas* v. *Bica*, 424 U.S. 351, 360 (1976). This fundamentally changed when Congress enacted IRCA. That statute, which President Reagan termed "the product of one of

the longest and most difficult legislative undertakings in recent memory,"[1] created a "comprehensive scheme prohibiting the employment of illegal aliens in the United States" and it "forcefully made combating the employment of illegal aliens central to the policy of immigration law." *Hoffman Plastic Compounds* v. *NLRB*, 535 U.S. 137, 147 (2002) (alterations and internal quotation marks omitted); see also *INS* v. *Nat'l Ctr. for Immigrants' Rights*, 502 U.S. 183, 194 n.8 (1991). Congress was explicit that enforcement was to be "uniform[ ]." IRCA § 115.

1. IRCA prohibits hiring unauthorized workers, and establishes a federal system for verifying work-authorization status and defining, investigating, and adjudicating violations. Under IRCA, it is unlawful to "hire, or to recruit or refer for a fee, for employment in the United States an alien knowing the alien is an unauthorized alien." 8 U.S.C. § 1324a(a)(1). An "unauthorized alien" is defined by federal law as one who is (i) not "lawfully admitted for permanent residence" or (ii) not "authorized to be so employed by this chapter or by the Attorney General." *Id.* § 1324a(h)(3). Whether a worker is "authorized" is not coextensive with citizenship or immigration status: The Attorney General has promulgated an array of rules setting forth allowances and exclusions for dozens of classes of individuals who are "authorized" to be employed in this country. See, *e.g.*, 8 C.F.R. § 274a.12.[2] Federal statutes and regulations vest ex-

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[1] Statement of the President Upon Signing S. 1200, Nov. 10, 1986, *reprinted in* 1986 U.S.C.C.A.N. 5856-1; *see also* H.R. Rep. No. 99-682(I), at 51-56 (1986) (discussing 15-year history of IRCA); S. Rep. No. 99-132, at 18-26 (1985) (same).

[2] For example, 8 C.F.R. § 274a.12(a) and (c) allow work authorization for lawful permanent residents; lawful temporary resi-

clusive authority to administer these requirements in the Departments of State, Labor, Homeland Security (DHS), and Justice. See, *e.g.*, 6 U.S.C. §§ 236, 271; 8 U.S.C. §§ 1103(a), 1103(g), 1151, 1153, 1182(a)(5), 1201; 8 C.F.R. § 274a.12; *id.* pt. 1003; 20 C.F.R. pts. 655, 656.

Alleged violations are investigated by federal immigration officials. 8 U.S.C. § 1324a(e)(2); see 6 U.S.C. § 557 (noting the transfer of certain authority to DHS). The Attorney General must provide to the employer formal notice of the allegations and an opportunity for a hearing. 8 U.S.C. § 1324a(e)(3)(A). That hearing must be held before a federal administrative law judge at the time and place prescribed by federal statute and regulation. *Id.* § 1324a(e)(3)(B); 8 C.F.R. § 274a.9. The federal government bears the burden of proof, and every aspect of the procedures—from the admissibility of evidence to the size of the paper on which pleadings are submitted—is spelled out by federal law. 28 C.F.R. pt. 68. The employer is further guaranteed the right to appeal an adverse finding through an administrative review process (including, in certain circumstances, review by the At-

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dents; refugees; asylees; persons granted withholding of removal, extended voluntary departure, or temporary protective status; persons subject to a final order of removal; parents or children of certain lawful permanent residents; certain spouses, fiancées, and dependents of holders of A, G, K, and J visas; persons subject to the federal government's "Family Unity Program"; certain persons holding E, F, G, H, I, J, L, O, P, Q, R, S, T, U, and V visas, and certain Mexican and Canadian holders of A, E, G, H, I, J, L, O, P, and R visas under NAFTA; certain applicants for asylum, withholding of removal, cancellation of removal, and suspension of deportation; certain staff and employees of holders of B, E, F, H, I, J, and L visas; and battered spouses and children under the federal Violence Against Women Act.

torney General), and to petition for review in a federal court of appeals. 8 U.S.C. § 1324a(e)(7)-(8). Orders issued under these provisions may be enforced through a suit brought by the Attorney General "in any appropriate district court of the United States." *Id.* § 1324a(e)(9).

IRCA also carefully regulates the penalties that may be assessed against employers. *Id.* § 1324a(e)(4). The administrative law judge is required to impose a monetary fine of "not less than $250 and not more than $2,000 for each unauthorized alien" for a first violation. *Id.* Penalties increase to $2,000-$5,000 for a second violation, and $3,000-$10,000 for subsequent violations.[3] *Id.* An employer that engages in a "pattern or practice" of violations is subject to criminal fines of $3,000 and six months' imprisonment for each unauthorized alien. *Id.* § 1324a(f).

2. IRCA does not focus single-mindedly on enforcement and punishment. To the contrary, Congress recognized other, ofttimes-competing goals. In particular, it intended IRCA to be the "least disruptive to the American businessman ... [while] also minimiz[ing] the possibility of employment discrimination." H.R. Rep. No. 99-682(I), at 56; S. Rep. No. 99-132, at 8-9 (same).

Over the course of the lengthy legislative debates, particular concern arose that imposing penalties on businesses could cause employers to discriminate against job applicants based on perceived national origin. The fear was that employers would simply choose to hire candidates who safely "appear" employable, rather than risk violating federal law. To

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[3] These penalties have been increased by regulation to account for inflation. 8 C.F.R. § 274a.10.

combat that danger, IRCA specifically prohibits discrimination by employers on the basis of nationality or citizenship. 8 U.S.C. § 1324b; see H.R. Rep. No. 99-682(I), at 69-70 (discussing anti-discrimination provisions); H.R. Conf. Rep. No. 99-1000, at 87 (1986). The statute prescribes escalating fines for violations of this prohibition, which precisely mirror the fines for knowingly employing an unauthorized worker. Compare 8 U.S.C. § 1324a(e)(4) (unauthorized worker violations), with *id.* § 1324b(g)(2)(B)(iv) (discrimination violations); see H.R. Rep. No. 99-682(I), at 56.

These same considerations were reflected in the I-9 process that Congress created for determining a prospective employee's work-authorization status. See 8 U.S.C. § 1324a(b); 8 C.F.R. § 274a.2(b). That process directs employers to provide a new employee with a list of the types of documents that he or she may submit as proof of identity and employment authorization. 8 U.S.C. § 1324a(b); 8 C.F.R. § 274a.2(a)(2), (3). The employee may choose any of the permissible documents to submit to the employer. 8 U.S.C. § 1324a(b)(1)(A). So long as the documents "reasonably appear[ ] on [their] face to be genuine," the employer must accept them as proof of identity or work authorization, and is forbidden from requesting different or additional documents. *Id.* An employer who complies with these requirements "in good faith" cannot be held liable for knowingly hiring an unauthorized worker, notwithstanding "a technical or procedural failure to meet [a prescribed] requirement," and even if the individual is later revealed to have been unauthorized to work. *Id.* § 1324a(a)(3), (b)(6). The I-9 form and "any information contained in or appended to such form, may not be used for purposes other than for enforcement of" the INA. *Id.* § 1324a(b)(5).

In addition to providing a means to ensure verification of employees, see H.R. Rep. No. 99-682(I), at 56, Congress anticipated that the I-9 process and related good-faith defense would decrease burdens on employers, and prevent them from making personal or unnecessary inquiries that would intrude on privacy and might result in discrimination. *Id.*; S. Rep. No. 99-132, at 8-9 (describing as "imperative" the need for a "formal, effective verification system combined with an affirmative defense for those [employers] who in good faith follow the proper procedure," in order to ensure that employers do not "seek to avoid penalties by avoiding persons they suspect might be illegal aliens").

Having balanced these considerations and calibrated its chosen enforcement mechanisms, Congress asserted the primacy of its authority: It expressly preempted "any State or local law imposing civil or criminal sanctions (other than through licensing and similar laws) upon those who employ, or recruit or refer for a fee for employment, unauthorized aliens." 8 U.S.C. § 1324a(h)(2). Even within the federal government, changes to the congressional design would require significant study and advance warning. The statute required the Comptroller General to prepare annual studies for several years, so that Congress could consider refinements. IRCA § 101(a)(1) (codified at 8 U.S.C. § 1324a(j)(1) (1986)). IRCA requires the President to monitor the effectiveness of the verification system, and to transmit to Congress detailed written reports of proposed changes well in advance of their effective date. 8 U.S.C. § 1324a(d). Any change in the documents used to prove work-authorization status is a "major change" requiring two years' written notice to Congress. *Id.* § 1324a(d)(3)(A)(iii), (D)(i).

3. For a decade, the I-9 process was the exclusive means for verifying employees' work-authorization status. In 1996, Congress established three "pilot programs" for status verification, IIRIRA § 401, in which employers could "[v]oluntar[il]y elect[ ]" to participate, *id.* § 402. The only pilot program that remains in existence[4] is an Internet-based program—first called the Basic Pilot Program and currently known as E-Verify—that is administered by the Secretary of Homeland Security. *Id.* § 403.[5] Employers who choose to participate in the program still must utilize the I-9 form. *Id.* § 403(a)(1); see U.S. Citizenship & Immigration Servs., *E-Verify User Manual for Employers* 13 (June 2010), *available at* http://www.uscis.gov. Participating employers submit status-verification information about new employees to the federal government over the Internet, which the government checks against databases. Privacy Act: Verification Information System Records Notice, 72 Fed. Reg. 17,569 (Apr. 9, 2007). The employer then receives either confirmation that the employee is work-authorized, or a tentative response of non-confirmation. IIRIRA § 403(a). In the latter case, the employee bears the burden of contesting the response with the federal government. *Id.* § 403(a)(4)(B). Participating employers are prohibited from terminating an employee because of the tentative non-

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[4] *See* DHS, *Report to Congress on the Basic Pilot Program* 1 (June 2004), *available at* http://www.nilc.org/immsemplymnt/ircaempverif/basicpilot_uscis_rprt_to_congress_2004-06.pdf.

[5] Responsibility for administering E-Verify was initially vested in the Attorney General, *see* IIRIRA § 403, and later transferred to the Secretary of DHS, *see* Basic Pilot Program Extension and Expansion Act of 2003, Pub. L. No. 108-156, §§ 3-4, 117 Stat. 1944, 1944-45.

confirmation during his or her challenge to a tentative non-confirmation. *Id.*

From E-Verify's inception, the program has been designed and implemented as experimental, and explicitly declared to be "voluntary." *Id.* § 402. Congress directed that the Secretary of Homeland Security "may not require any person or other entity to participate" in the program, *id.*, subject to limited, enumerated exceptions covering the federal government and IRCA violators, *id.* § 402(e). Congress has reauthorized and modified the program on several occasions,[6] and has repeatedly declined to act on proposals to make E-Verify or a similar program mandatory.[7]

B. The Legal Arizona Workers Act And Other State Laws.

Arizona enacted the Legal Arizona Workers Act in 2007. Ariz. Rev. Stat. §§ 23-211 to -214. Arizona's governor declared in signing the legislation: "Because of Congress' failure to act, States like Arizona

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[6] *E.g.*, Basic Pilot Extension Act of 2001, Pub. L. No. 107-128, § 2, 115 Stat. 2407, 2407; Basic Pilot Program Extension and Expansion Act of 2003, Pub. L. No. 108-156, §§ 3-4, 117 Stat. at 1944-45; Consolidated Security, Disaster Assistance, and Continuing Appropriations Act, Pub. L. No. 110-329, Div. A, § 143, 122 Stat. 3574, 3580 (2008); Department of Homeland Security Appropriations Act, Pub. L. No. 111-83, § 547, 123 Stat. 2142, 2177 (2009).

[7] *E.g.*, H.R. 2083, 111th Cong. § 8 (2009); H.R. 3308, 111th Cong. § 201 (2009); S. 1505, 111th Cong. §§ 201-202 (2009); H.R. 1951, 110th Cong. § 3 (2007); H.R. 19, 110th Cong. § 3 (2007); S. 2611, 109th Cong. § 301(a) (2006); S. 1348, 110th Cong. § 301(a) (2007); *cf.* American Recovery and Reinvestment Act of 2009, H.R. 1, 111th Cong. § 1114 (2009) (rejected proposal to require contractors receiving stimulus funds to participate in E-Verify).

have no choice but to take strong action to discourage the further flow of illegal immigration through our borders." J.A. 397. While nominally recognizing that "[i]mmigration is a federal responsibility," Arizona decided that "Congress [is] incapable of coping with the comprehensive immigration reforms of our country's needs." J.A. 394. Multiple States and localities followed Arizona's lead, enacting their own independent systems by which they purport to regulate authorization to work in the United States.

1. The Arizona Act has two principal parts: a regime to define who is an unauthorized worker and to adjudicate and impose sanctions on those who employ one; and an E-Verify mandate.

a. The Arizona Act creates a new state-law offense of "knowingly" or "intentionally" employing "an unauthorized alien." Ariz. Rev. Stat. §§ 23-212(A), 23-212.01(A). It also establishes a state-law enforcement regime to enforce this prohibition. The Act directs Arizona's attorney general to "prescribe a complaint form for a person to allege," including "anonymous[ly]," that an employer is employing an unauthorized alien. *Id.* §§ 23-212(B), 23-212.01(B). Upon receiving any complaint that is not both "false and frivolous," the attorney general or county attorney must notify federal immigration enforcement officials and "local law enforcement" officials "of the unauthorized alien." *Id.* §§ 23-212(C), 23.212.01(C). Moreover, the attorney general must "notify the appropriate county attorney to bring" an enforcement action against the employer in state court "in the county where the unauthorized alien employee is or was employed by the employer." *Id.* §§ 23-212(C)-(D), 23-212.01(C)-(D).

The Arizona Act defines "unauthorized alien" by reference to that term's federal definition, *id.* § 23-

211(11) (citing 8 U.S.C. § 1324a(h)(3)), and specifies how to adjudicate such status. It directs state courts, in "determining whether an employee is an unauthorized alien," to "consider only the federal government's determination pursuant to 8 United States Code § 1373(c)." *Id.* §§ 23-212(H), 23-212.01(H). Section 1373(c), however, directs federal officials to respond to state inquiries about "citizenship or immigration status," not work authorization. *Infra* pp. 40-42; cf. *supra* note 2 (identifying classes of individuals with work authorization but not necessarily immigration status). In addition, the federal government's determination creates only "a rebuttable presumption of the employee's lawful status." Ariz. Rev. Stat. §§ 23-212(H), 23-212.01(H). Thus, a state court can reject immigration status information received from the federal government under § 1373(c), and reach its own determination under the Arizona Act whether an employee is an "unauthorized alien" and whether the employer knowingly or intentionally employed such an unauthorized worker. *Id.* §§ 23-212(I), 23-212.01(I); see also *id.* §§ 23-212(J), 23-212.01(J) (establishing defense of "good faith" compliance with federal I-9 process, as determined by state court).

In addition to the new state-law prohibition and system of investigation and adjudication, the Arizona Act establishes a range of sanctions. For any violation, the court must order the employer "to terminate the employment of all unauthorized aliens" and to file quarterly reports with the county attorney listing new employees hired. *Id.* §§ 23-212(F)(1), 23-212.01(F)(1). In addition, for a first "knowing" violation, a state court may direct the suspension of an employer's "licenses." *Id.* § 23-212(F)(1). The court must direct suspension of an employer's "licenses" upon a first "intentional" violation, *id.* § 23-

212.01(F)(1), and for a second "knowing" or "intentional" violation, the court must order state agencies to "permanently revoke all licenses," *id.* §§ 23-212(F)(2), 23-212.01(F)(2).

The Act does not use the term "license" as it is used elsewhere in Arizona law; rather, it specially defines the term to include "any agency permit, certificate, approval, registration, charter, or similar form of authorization," as well as a company's foundational documents, such as "[a]rticles of incorporation" and "certificate[s] of partnership." *Id.* § 23-211(9). The definition expressly excludes "[a]ny professional license." *Id.* § 23-211(9)(ii). Thus, a company found to have violated Arizona's law faces not only losing the ability to engage in a particular business, but also having its existence extinguished.

b. The Act also requires all Arizona employers to participate in E-Verify. *Id.* § 23-214(A). Employers must provide proof of E-Verify registration to any state entity from which they seek any "grant, loan or performance-based incentive." *Id.* § 23-214(B). An employer that fails to participate in E-Verify will be denied these incentives, and forced to repay any benefits it previously obtained. *Id.*

2. As the governor forthrightly predicted, J.A. 397, States and municipalities across the country have followed Arizona's lead, enacting an array of different laws. The National Conference of State Legislatures reports that thousands of immigration bills have been introduced by state legislatures in the last five years, with hundreds enacted into law.[8] The re-

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[8] Nat'l Conf. of State Legislatures, *2010 Immigration-Related Bills and Resolutions in the States* (July 20, 2010), *available at* http://www.ncsl.org/default.aspx?TabId=20881; *see also* Nat'l

sult has been a radical departure from the "uniform and uniformly enforced immigration law" that even Arizona's governor agreed is necessary. *Id.* These laws impose a variety of different and sometimes conflicting obligations on employers, and subject them to a range of penalties for unauthorized worker violations, including in some cases imprisonment.[9] This variability particularly plagues legislation concerning E-Verify, with some States requiring participation, others attempting to preclude it, and various alternatives in-between.[10] These statutes have created a

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Conf. of State Legislatures, *2009 Immigration-Related Bills and Resolutions in the States* (Apr. 22, 2009), *available at* http://www.ncsl.org/documents/Immig/ImmigrationReportJAN2009.pdf.

[9] *Compare* Miss. Code Ann. § 71-11-3(7)(e) (imposing so-called "licensing" sanctions similar to Arizona's); Mo. Rev. Stat. §§ 285-525, -530; S.C. Code Ann. § 41-8-50; Tenn. Code Ann. § 50-1-103(e); W. Va. Code § 21-1B-7; Albertville, Ala., Resolution No. 945-08 § 4; Apple Valley, Cal., Resolution No. 2006-82; Hazleton, Pa., Ordinance No. 2006-18 § 4(B), *held preempted in Lozano* v. *City of Hazleton*, 496 F. Supp. 2d 477, 520-29 (M.D. Pa. 2007), *and* Okla. Stat. tit. 25, § 1313(C) (subjecting employers found to have violated state immigration laws to tort liability and civil damages), *held preempted in Chamber of Commerce of U.S.* v. *Edmondson*, 594 F.3d 742, 765-70 (10th Cir. 2010); La. Rev. Stat. Ann. § 23:994; Miss. Code Ann. § 71-11-3(4)(d); Hazleton, Pa., Ordinance No. 2006-18 § 4(E), *held preempted in Lozano*, 496 F. Supp. 2d at 520-29, *with* La. Rev. Stat. Ann. § 23:993 (imposing civil and criminal penalties on employers deemed to have hired unauthorized workers); W. Va. Code § 21-1B-5.

[10] *Compare* Ariz. Rev. Stat. § 23-214 (requiring E-Verify of all employers); Miss. Code Ann. § 71-11-3(3)(d), (4)(b)(i); Utah Code Ann. § 13-47-201; Va. Code Ann. § 40.1-11.2, *and* Colo. Rev. Stat. § 8-17.5-102 (requiring E-Verify for businesses seeking public contracts); Ga. Code Ann. § 13-10-91; Exec. Order No. 08-01 (Minn. Jan. 7, 2008); Mo. Rev. Stat. §§ 285-525, -530; Exec. Order No. 08-01 (R.I. Mar. 27, 2008); Albertville, Ala., Resolu-

"patchwork of ... [different] laws, rules, and regulations," which is difficult for employers and employees to understand, much less to follow. *Rowe* v. *N.H. Motor Transp. Ass'n*, 552 U.S. 364, 373 (2008).

C. Procedural Background.

A strikingly diverse group of business, labor, and civil rights groups challenged the constitutionality of the Arizona Act in the United States District Court for the District of Arizona. They alleged, among other things, that the Act was expressly and impliedly preempted by IRCA. The multiple similar lawsuits later were consolidated for decision. Pet. App. 6a, 12a, 107a-09a.

The district court held the Act not preempted. With respect to express preemption, it acknowledged that the penalties imposed by the Act are "sanctions" within the meaning of IRCA's preemption provision. Pet. App. 61a-76a. It concluded, however, that the Act constituted a "licensing [or] similar law[ ]," and so fell within the preemption provision's savings clause. *Id.* The court further held that the Act's provisions concerning E-Verify were not impliedly preempted. *Id.* at 82a-85a. Although it recognized that Congress had made E-Verify voluntary, the court found no preemption because Congress had not explicitly precluded States from making the program mandatory. *Id.*

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tion No. 945-08 § 4; Mission Viejo, Cal., Ordinance No. 07-260 § 1; Hazleton, Pa., Ordinance No. 2006-18 § 4(D), *held preempted in Lozano*, 496 F. Supp. 2d at 526-29, *and* Okla. Stat. tit. 25, §§ 1312, 1313(B)(2) (requiring employers to use a state-created employment verification system, which may or may not be compatible with E-Verify), *with* 820 Ill. Comp. Stat. 55/12(a) (forbidding employers to participate in E-Verify), *held preempted in United States* v. *Illinois*, No. 07-3261, 2009 WL 662703, at *2-3 (C.D. Ill. Mar. 12, 2009).

The Ninth Circuit affirmed. It agreed with the district court that, because Arizona had defined the Act's sanctions to be "licensing" penalties, the statute fell within IRCA's savings clause. Pet. App. 14a-19a. It also agreed that, because Congress "could have, but did not, expressly forbid state laws from requiring E-Verify participation," Arizona's E-Verify mandate was not preempted. *Id.* at 20a. Both the district court and the Ninth Circuit viewed themselves as largely bound by this Court's 1976 decision in *De Canas*. See *id.* at 15a-16a, 69a-70a. The Ninth Circuit followed *De Canas*, notwithstanding its recognition that IRCA's enactment had dramatically changed the legal landscape. See *id.* at 15a-16a.

SUMMARY OF ARGUMENT

1. The Ninth Circuit erred when it held that the Arizona Act is saved from preemption as a "licensing [or] similar law[ ]" because one of the various possible consequences under the comprehensive regulatory regime enacted by Arizona is to deny or revoke a "license" as Arizona has redefined that term. Pet. App. 14a-19a. On this theory, a State may regulate work-authorization status in whatever fashion it wishes—so long as, at the end of the day, something labeled a license may be affected.

This conclusion distorts the meaning of the statute, and subverts congressional intent. If this is all that is required to constitute a "licensing [or] similar law[ ]," the preemption clause is meaningless, as this very case demonstrates. Nothing about the Arizona Act remotely resembles a "licensing law." In purpose and function, it is a law regulating the employment of unauthorized workers. It establishes state law prohibitions against employing unauthorized workers; creates methods under state law (different from those

under federal law) for investigating and adjudicating violations, including methods (different from those under federal law) for determining who is an unauthorized worker; and authorizes an array of sanctions for violations (of which a license sanction is just one) having little to do with "licensing" in the traditional sense. If this regime is not preempted, then IRCA's fundamental purpose of establishing a national and "uniform[ ]" system of regulating alien employment, IRCA § 115, is utterly without effect.

IRCA's history and structure demonstrate that the savings clause targeted a narrow purpose: ensuring that States could rely on federal determinations of compliance with federal immigration laws when issuing business licenses or permits to farm labor contractors. This purpose is clear from the legislative history and is reflected in IRCA's conforming amendments to the federal Migrant and Seasonal Agricultural Worker Protection Act (AWPA). These amendments removed AWPA's independent prohibition against hiring unauthorized workers, which had been enforced through federal administrative proceedings, and substituted a requirement of a predicate IRCA determination. See 29 U.S.C. § 1813(a)(6). IRCA's displacement of other federal enforcement provisions demonstrates the statute's sharply preemptive effect, and belies any suggestion that IRCA was intended to allow States to judge for themselves an individual's work-authorization status.

At most, a state statute is a "licensing [or] similar law" under IRCA if it conditions the issuance or retention of a genuine license—a registration or permit governing "fitness to do business," H.R. Rep. No. 99-682(I), at 58—on a prior federal determination of noncompliance with federal immigration law. The savings clause permits States to tack on certain sanc-

tions—in the form of the "suspension, revocation or refusal to reissue a license"—for persons "who ha[ve] been found to have violated the sanctions provisions *in this legislation*." *Id.*[11] IRCA provides for these determinations to be made by federal officials, in specialized administrative proceedings conducted under federal rules and regulations, see 8 U.S.C. § 1324a(e); 28 C.F.R. pt. 68, and nothing in the statute hints at authorizing States to adjudicate immigration status or employment eligibility—much less in the face of a contrary federal determination. Quite the contrary, the preemption provision was aimed at displacing existing state statutes that undertook just such regulation.

The preemption provision in fact confirms what would already be the case: Competing state regulatory schemes like Arizona's conflict with the comprehensive system that Congress crafted in IRCA. IRCA represents a careful compromise among multiple interests and objectives beyond enforcement—preventing discrimination, protecting privacy, and avoiding undue burdens on business. The balance struck by Congress is reflected in IRCA's detailed administrative scheme for investigating, adjudicating, and sanctioning unauthorized worker violations, with corresponding anti-discrimination protections and a right to petition for federal judicial review. The Arizona scheme upsets this balance. It imposes sanctions that federal law does not allow, through an adjudicatory process that federal law does not contemplate, and without providing the rights of fair process and appeal that federal law guarantees. In short, Arizona has created its own separate status-

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[11] Emphases are added throughout unless otherwise noted.

verification system that, in focusing exclusively on enforcement, ignores the methods Congress chose and subverts the public interest balance Congress struck.

2. The Ninth Circuit further erred in authorizing Arizona to make mandatory the voluntary federal E-Verify program. Federal law repeatedly and expressly makes clear that E-Verify is, and must be administered as, a voluntary program. This is clear from the very title of the authorizing statute: "*Voluntary Election* to Participate in a Pilot Program." IIRIRA § 402. The statute affords employers the choice whether to participate: "[A]ny person or other entity that conducts any hiring ... *may elect* to participate in that pilot program." *Id.* § 402(a). And, the Secretary of Homeland Security is required to "widely publicize ... the voluntary nature of the pilot programs." *Id.* § 402(d)(2).

Congress made E-Verify voluntary for good reason. E-Verify was initiated as an experimental program, to assess its viability as an alternative to the I-9 process and its acceptance by the business community. It never has been made permanent. It historically has been error-prone, and requires participating employers to weigh possible benefits against serious burdens. Congress considered these issues in enacting IIRIRA, making the I-9 process (with a variety of document-based verification methods) mandatory, while instituting E-Verify as a voluntary test program—"the Basic *Pilot* Program"—that employers may choose to use. See 8 U.S.C. § 1324a(b); 8 C.F.R. § 274a.2(b). Arizona's decision to make E-Verify mandatory conflicts directly with Congress's decision to make it voluntary, and the state law therefore is preempted.

ARGUMENT

I. THE UNAUTHORIZED WORKER PROVISIONS OF THE ARIZONA ACT ARE PREEMPTED.

A. The Unauthorized Worker Provisions Are Expressly Preempted.

A cornerstone of our constitutional structure is the supremacy of federal law. *E.g.*, *Crosby* v. *Nat'l Foreign Trade Council*, 530 U.S. 363, 372 (2000). Statutes passed by Congress are "the supreme Law of the Land," and cannot be nullified, contradicted, or frustrated by local regulation. *Altria Group* v. *Good*, 129 S. Ct. 538, 543 (2008) (quoting U.S. Const. art. VI, cl. 2). State laws that conflict with federal provisions—whether because Congress explicitly foreclosed state regulation in the field, or because state regulation would impede the operation or objectives of federal law—are thus "without effect." *Id.*; *CSX Transp.* v. *Easterwood*, 507 U.S. 658, 663 (1993); *Fid. Fed. Sav. & Loan Ass'n* v. *de la Cuesta*, 458 U.S. 141, 152-53 (1982). The Arizona Act runs afoul of these basic principles.

IRCA expressly preempts state law, and it does so broadly: The preemption provision covers "any" state law that imposes sanctions on those who hire unauthorized workers.

> The provisions of this section preempt any State or local law imposing civil or criminal sanctions (other than through licensing and similar laws) upon those who employ, or recruit or refer for a fee for employment, unauthorized aliens.

8 U.S.C. § 1324a(h)(2).

It is undisputed that the unauthorized worker provisions of the Arizona Act constitute "sanctions" with-

in the meaning of this provision. Pet. App. 14a-19a; see Pet. 23 n.10; BIO 4. This concession is plainly correct: Those provisions prohibit employers from hiring unauthorized workers, establish a state process for adjudicating violations, and impose penalties for violations. Ariz. Rev. Stat. § 23-212(A)-(J). The unauthorized worker provisions therefore are saved from preemption only if they are a "licensing [or] similar law[ ]." They are not.

1. The Ninth Circuit's Interpretation Of The Preemption Provision Does Violence To Its Language And Purposes.

The Ninth Circuit interpreted IRCA's savings clause in a boundless fashion that would nullify the preemption provision to which it is a limited exception. First, the Ninth Circuit discussed at some length this Court's earlier decision in *De Canas*, 424 U.S. 351. But *De Canas* concerned implied field rather than express preemption, *id.* at 356—indeed, it was decided before IRCA's express preemption provision was enacted—and its discussion even of implied preemption has been overtaken by the comprehensive legislation that Congress subsequently enacted in IRCA and IIRIRA. *Infra* pp. 46-47.

The Ninth Circuit's express preemption theory is contained within just a few sentences. Because "[t]he Act provides for the suspension of employers' licenses," the court reasoned, "the savings clause therefore exempts such state licensing regulation from express preemption." Pet. App. 17a. Arizona has advocated this same capacious interpretation. In its view, the Arizona Act is "permitted by federal law" because "it provides for the suspension or revocation of business licenses under certain circumstances." Defs.-Appellees' Consolidated Answering Br. 19 (9th Cir.

Dkt. No. 51). In short, any law that could lead to sanctions being imposed against what the State labels a license would be saved from preemption, regardless what else that law purports to regulate or how it seeks to do so.

If this is all that is required to satisfy the savings clause, the preemption provision is a nullity. On this reasoning, a State could—as Arizona has done here—evade IRCA's broad preemption provision through the artifice of redefining "licensing" differently from any traditional meaning. Indeed, the Arizona Act goes so far as to define "license" differently even from the term's usual meaning under *Arizona* law: It *excludes* "professional license[s]," Ariz. Rev. Stat. § 23-211(9)(c)(ii), but *includes* a broad swath of other forms of documents, such as

- a "transaction privilege tax license," which is required under Arizona law for "[e]very person who receives gross proceeds of sales or gross income ... desiring to engage or continue in business," *id.* §§ 42-5005(A), 42-5008;
- "[a] grant of authority issued under title 10, chapter 15," under which foreign corporations transact business within the State, *id.* §§ 10-1501, 10-1505, 10-1530; and, most notably,
- "[a] certificate of partnership" and "[a]rticles of incorporation."

Id. § 23-211(9)(b); see *supra* pp. 12-13.

Under the Ninth Circuit's reasoning, a State could evade the force of Congress's prohibition by disguising any sanction as a "licensing fee" to be levied on any employer found to have hired unauthorized workers. Or, it could "impute" an "employment li-

cense" to every employer, then suspend that "license" for knowingly or intentionally hiring an unauthorized alien—which, in fact, is what South Carolina has done. S.C. Code Ann. §§ 41-8-20(A), 41-8-50(D)(2)-(4). Or it could, as Arizona has done here, create an entire regulatory structure for determining who is lawfully in the country and authorized to work, enforced through a sanction—seizing a company's articles of incorporation—that is unlike "licensing" in any traditional sense.

Had Congress intended to allow States such a role in regulating and enforcing work authorization, it surely would have said so in some less obscure fashion than using the term "licensing" in a parenthetical. "Congress ... does not ... hide elephants in mouseholes." *Whitman* v. *Am. Trucking Ass'ns*, 531 U.S. 457, 468 (2001). When Congress desires state involvement in immigration enforcement, it commonly makes that purpose clear. *E.g.*, 8 U.S.C. §§ 1226(d), 1357(g). Simply put, if Congress meant to reach this counter-intuitive result, "it chose a singularly odd word with which to do it." *Medtronic* v. *Lohr*, 518 U.S. 470, 487 (1996) (plurality).[12]

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[12] The Medicare Modernization Act contains a preemption provision and savings clause that closely track those in IRCA: "The standards established under this part shall supersede any State law or regulation (*other than State licensing laws* or State laws relating to plan solvency) with respect to MA plans which are offered by MA organizations under this part." 42 U.S.C. § 1395w-26(b)(3). The agency responsible for implementing this provision has noted that "licensing" must be defined narrowly, and cannot include even the conditions for keeping the license, because such a broad definition of licensing could allow the State to regulate in preempted areas. Medicare Program, 69 Fed. Reg. 46,866, 46,904 (proposed Aug. 3, 2004).

There must, in short, be some limit on the meaning of the term "licensing and similar laws" beyond, as the Ninth Circuit concluded here, any statute that uses the word "license." As we discuss next, at most the term as used in IRCA refers to traditional regulation of fitness to engage in a profession, such as the farm labor contractor businesses that were the focus of Congress's attention. But, whatever the precise boundaries of the term, there is no need to "par[e] the term ... down to the definitional bone" to see that the scheme enacted by Arizona is not a "licensing" law in any sense of the word. *Foster* v. *Love*, 522 U.S. 67, 72 (1997); *Bonito Boats* v. *Thunder Craft Boats*, 489 U.S. 141, 157 (1989) ("It is readily apparent that the Florida statute does not operate to prohibit 'unfair competition' in the usual sense that the term is understood."); see *Morales* v. *Trans World Airlines*, 504 U.S. 374, 390 (1992) ("[T]he present litigation plainly does not present a borderline question [on the reach of the preemption provision], and we express no views about where it would be appropriate to draw the line.").

2. The Phrase "Licensing And Similar Laws" Was Aimed At Very Specific State Laws And Certainly Does No More Than Preserve Genuine Licensing Laws Governing Fitness To Do Business.

The meaning of the term "licensing and similar laws" in IRCA is a matter of federal law. See *Miss. Band of Choctaw Indians* v. *Holyfield*, 490 U.S. 30, 43 (1989) ("[I]n the absence of a plain indication to the contrary ... Congress when it enacts a statute is *not* making the application of the federal act dependent on state law."). Federal law establishes the metes and bounds of the term, in accordance with the statute's language and structure, and Congress's objec-

tives and expectations. See *Engine Mfrs. Ass'n* v. *S. Coast Air Quality Mgmt. Dist.*, 541 U.S. 246, 252-53 (2004); see also, *e.g.*, *Am. Airlines, Inc.* v. *Wolens*, 513 U.S. 219, 223-24 (1995). A State may not evade the statute's strictures by seeking to define them away. Cf. *Int'l Paper* v. *Ouellette*, 479 U.S. 481, 495 (1987) (declining to interpret a savings clause to permit "States [to] do indirectly what they could not do directly").

"'[T]he purpose of Congress is the touchstone' in every pre-emption case." *Medtronic*, 518 U.S. at 485. Here, when Congress preserved sanctions imposed through "licensing and similar laws" from express preemption, it had in mind a particular type of state statute: "'fitness to do business laws,' such as state farm labor contractor laws." H.R. Rep. No. 99-682(I), at 58. At the time IRCA was enacted, approximately 12 States had enacted laws requiring a state license or registration certificate to engage in the business of farm labor contracting.[13] These laws typically conditioned such licenses on specified qualifications and

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[13] *See* Cal. Lab. Code §§ 1693-1694 (1986); Fla. Stat. §§ 450.28-.35 (1986); 225 Ill. Comp. Stat. 505/6 (1986); Md. Code Ann., Labor & Empl. § 100-80A to -80E (1986); Mich. Comp. Laws §§ 286.651-.657 (1986); Neb. Rev. Stat. §§ 48-1701 to -1714 (1986); N.J. Stat. Ann. § 34:8A-11 (1986); N.Y. Lab. Law § 212-a (1986); Or. Rev. Stat. §§ 658.405-.503 (1986); 43 Pa. Stat. Ann. §§ 1301.501-.505 (1983); Tex. Rev. Civ. Stat. Ann. art. 5221a-5 (1986); Wash. Rev. Code § 19.30 (1986). Few of these laws independently prohibited the hiring of unauthorized workers. *See* Or. Rev. Stat. § 658.440(3)(d) (1986); 43 Pa. Stat. Ann. § 1301.505 (1983). These provisions essentially replicated the prohibition then found in AWPA (and which at the time were permitted by AWPA's savings clause), and were preempted when Congress conformed AWPA to IRCA. *See* IRCA § 101(b); *infra* pp. 32-34.

requirements that demonstrated the contractor's fitness, *e.g.*, Cal. Lab. Code §§ 1693-1694 (1986), and most conditioned issuance or maintenance of a license upon the contractor's record of compliance with federal law, *e.g.*, *id.* § 1690; 225 Ill. Comp. Stat. 505/6 (1986).[14]

That Congress had such laws in mind is confirmed by the interrelationship between IRCA and the Migrant and Seasonal Agricultural Worker Protection Act (AWPA), 29 U.S.C. §§ 1801-1872. As discussed in further detail below, *infra* pp. 32-34, IRCA modified the AWPA through a set of conforming amendments. And, pertinent here, the AWPA is a classic fitness-to-do-business provision: It prohibits individuals and businesses from engaging in any "farm labor contracting activity" (*i.e.*, "employing, furnishing, or transporting any migrant or seasonal agricultural worker," 29 U.S.C. § 1802) without first securing a registration certificate from the Department of Labor. 29 U.S.C. § 1811. To obtain that certificate, the applicant must certify that it "has [not] been found to have violated" IRCA's prohibition against hiring unauthorized workers. *Id.* § 1813(a)(6).

If the licensing proviso preserves anything more than farm labor contracting and similar laws, it certainly permits no more than sanctions imposed through traditional "fitness to do business laws." H.R. Rep. No. 99-682(I), at 58. Statutory interpreta-

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[14] Several of these state laws described the license as a "certificate of registration." *E.g.*, 225 Ill. Comp. Stat. 505/3. This explains why § 1324a(h)(2) refers to "licensing *and similar* laws": Congress wished to ensure that all such state laws—regardless of the superficial language used by a State—would be preserved.

tion requires more than reliance on dictionaries,[15] but they demonstrate that fitness to do business is a common meaning of the term "license." *E.g.*, *Webster's Third New International Dictionary* 1304 (1993) (defining "license" as "a right or permission granted in accordance with law by a competent authority to engage in some business or occupation"); *Random House Webster's Unabridged Dictionary* 1109 (2d ed. 1997) (similar); *Oxford English Dictionary* 891 (2d ed. 1989) ("To grant (a person) a licence or authoritative permission to hold a certain status or to do certain things, e.g. to practise some trade or profession ...."); see also *Cleveland* v. *United States*, 531 U.S. 12, 21 (2000) ("licensing schemes long characterized by this Court as exercises of state police powers" include "license to transport alcoholic beverages," "license to sell corporate stock," "ferry license," and "license to sell liquor").

Other federal statutes use "licensing" in this same manner. *E.g.*, 7 U.S.C. § 499c (commission merchant licensing); 19 U.S.C. § 1641(b)(2) (customs broker licensing). Such statutes often impose a condition of complying with other specified laws or regulations. *E.g.*, 18 U.S.C. § 923(d)(1)(F) (certain firearms dealer licenses); 49 U.S.C. § 41304(c) (foreign air carrier certificate). Particularly telling here, Arizona itself uses

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[15] *E.g.*, *MCI Telecomms. Corp.* v. *AT&T Co.*, 512 U.S. 218, 226 (1994) (in interpreting a statutory term, the Court "d[oes] not rely exclusively upon dictionary definitions, but also upon contextual indications"); *Pub. Citizen* v. *U.S. Dep't of Justice*, 491 U.S. 440, 454-55 (1989) ("it is one of the surest indexes of a mature and developed jurisprudence not to make a fortress out of the dictionary; but to remember that statutes always have some purpose or object to accomplish") (quoting *Cabell* v. *Markham*, 148 F.2d 737, 739 (2d Cir.) (L. Hand, J.), *aff'd*, 326 U.S. 404 (1945)).

the term "licensing"—outside of this one context—to mean fitness to do business, and defines it as the

> process by which an agency of government grants permission ... to engage in a given occupation on finding that the applicant has attained the minimal degree of competency required to ensure that the public health, safety and welfare will be reasonably protected.

See *Arizona Legislative Bill Drafting Manual* § 4.21 (2009), *available at* http://www.azleg.gov/alisPDFs/council/2010%20Bill%20Drafting%20Manual.pdf; see also Business Licenses by Agency or Department, https://az.gov/app/license/bus.xhtml (last visited Aug. 31, 2010) (listing forms of Arizona business licenses and linking to governing provisions).

In short, when Congress used the term "licensing" in IRCA, it was referring to traditional licensing and registration schemes, like AWPA, that condition permission to engage in a business—such as the labor contracting businesses that were the focus of Congress's attention—on a record of compliance with federal immigration law. This understanding takes account of the accepted understanding of "licensing"; preserves traditional state authority to set conditions on issuing licenses; and, at the same time, ensures that the regulation of those who "employ ... unauthorized aliens," 8 U.S.C. § 1324a(h)(2), remains a uniform matter of federal law.

3. IRCA Preempted Alternate Regimes For Adjudicating Unauthorized Worker Violations.

At the core of what Congress meant to displace were regimes, like Arizona's, that established unauthorized worker prohibitions and mechanisms for enforcement and adjudication separate from IRCA. For

this reason as well, the Arizona Act is not a "licensing [or] similar law[ ]," because it creates a separate regime regulating the employment of unauthorized workers, and would predicate violations on state-court adjudication of a state-defined offense.

a. This interpretation of IRCA flows first from its language. By its terms, the savings clause allows States only to impose a particular type of "sanction" on employers found to have hired "unauthorized aliens." 8 U.S.C. § 1324a(h)(2). It does not authorize a State to define the core federal question of who is "unauthorized," nor to adjudicate whether a worker is unauthorized or whether an employer knowingly hired such a person. See *id.* To the contrary, IRCA defines "unauthorized alien" as a matter of federal law, *id.* § 1324a(h)(3); it establishes "employ[ing]" an "unauthorized alien" as a violation of federal law, *id.* § 1324a(a); and it vests authority over those determinations in the U.S. Attorney General, *id.* The "licensing laws" preserved by the savings clause are "lawful state or local processes concerning the suspension, revocation, or refusal to reissue a license to any person who has been found to have violated the sanctions provisions *in this legislation*." H.R. Rep. No. 99-682(I), at 58.

The statutory structure demonstrates plainly that Congress expected violations of IRCA giving rise to licensing sanctions to be adjudicated exclusively by the federal government. Congress established a "uniform[ ]" nationwide system for regulating employment verification and authorization, IRCA § 115, and expressly forbade use of the verification information for purposes other than enforcement of the INA and enumerated prohibitions against false statements, 8 U.S.C. § 1324a(b)(5). Congress carefully calibrated procedures for adjudicating alleged violations

through federal agency procedures (including a right to seek federal judicial review). *Supra* pp. 4-6. In the debates that raged in Congress for over a decade about how to craft federal policy concerning the employment of aliens, the only issue that seems never to have been in doubt was the need for federal primacy. See, *e.g.*, S. Rep. No. 99-132, at 18-26; H.R. Rep. No. 99-682(I), at 51-56. There is no inkling in IRCA's text, its purpose, or its legislative debates that, having created this "comprehensive" and "uniform" system, Congress meant to give States carte blanche to establish independent adjudicatory procedures for determining who is and who is not authorized to work.

b. On the contrary, IRCA's historical backdrop shows that Congress's very purpose was to get States out of the business of adjudicating unauthorized worker violations. At the time IRCA was enacted, there were two principal groups of state statutes touching on work-authorization status. There were the fitness-to-do-business laws governing farm labor contractors, which Congress meant to preserve. *Supra* pp. 25-28. There also existed another 14 or so state laws that prohibited the employment of, for instance, people "not entitled to lawful residence in the United States."[16] These laws directly regulated employers, typically through fines and other sanctions unrelated to licensing, and many created separate

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[16] Cal. Lab. Code § 2805 (1984); Conn. Gen. Stat. § 31-51k (1972); Del. Code Ann. tit. 19, § 705 (1977); Fla. Stat. § 448.09 (1973); Kan. Stat. Ann. § 21-4409 (1977); La. Rev. Stat. Ann. § 23:995 (1985); Me. Rev. Stat. tit. 26, § 871 (1977); Mass. Gen. Laws ch. 149, § 19C (1976); Mont. Code Ann. § 41-121 (1977); N.H. Rev. Stat. Ann. § 275 A:4-a (1976); N.J. Stat. Ann. § 34:9-1 (1977); Tenn. Code Ann. § 50-1-103(b) (1986); Vt. Stat. Ann. tit. 21, § 444a (1977); Va. Code Ann. § 40.1-11.1 (1977).

state administrative regimes for ensuring compliance. *E.g.*, Conn. Gen. Stat. § 31-51k(c) (1972); Me. Rev. Stat. tit. 26, § 871(3) (1977); Mass. Gen. Laws ch. 149, § 19C (1976). It was these laws that Congress meant to preempt. These statutes were brought repeatedly to Congress's attention over the course of the legislative debates leading to IRCA.[17] Indeed, the California statute upheld in *De Canas* was one of these statutes, and *De Canas* led quickly to calls for preemption of such state statutes,[18] which were followed by the first IRCA precursors containing preemption provisions. See S. 2252, 95th Cong. § 5(a)(3) (1977); H.R. 9531, 95th Cong. § 5(a)(3) (1977).

The licensing proviso certainly offers no contrary indication that it was intended to authorize States to create separate adjudicatory mechanisms. Obtaining or retaining a license commonly is predicated on compliance with specified laws, but a licensing authority would not itself typically have the time, expertise, or resources independently to adjudicate whether the prospective licensee violated the law of

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[17] H.R. Rep. No. 94-506, at 7 (1975) ("many states have recognized the need for criminal sanctions against employers of illegal aliens"); *see, e.g., Hearings Before the Subcomm. on Immigration, Refugees, and International Law of the H. Comm. on the Judiciary*, 97th Cong. 1251 (1981) (statement of Roger Conner, Federation for American Immigration Reform); *Hearings Before Subcomm. No. 1 of the H. Comm. on the Judiciary*, pt. 1, 92d Cong. 149-62 (1971) (Statement of Hon. Dixon Arnett, California State Assemblyman).

[18] *E.g., Hearings Before the Subcomm. on Immigration and Naturalization, S. Comm. on the Judiciary*, 94th Cong. 25 (1976) (statement of Leonard F. Chapman, Jr., Commissioner, INS), *id.* at 103 (statement of Stanley Mailman, President, Association of Immigration and Nationality Lawyers).

some other jurisdiction, much less one outside the licensor's core expertise. A State's insurance commissioner, for instance, is an unlikely candidate to adjudicate whether the applicant committed a felony under the laws of some other State—but can reasonably take note of whether an insurance producer was "*convicted* of a felony." Ariz. Rev. Stat. § 20-295(A)(6).[19] This is all the more true in a specialized administrative framework like immigration and work-authorization status, in which the fact of whether a worker is "unauthorized" is immensely complicated and governed by extensive federal regulation. See, *e.g.*, *supra* pp. 4-6 & note 2.

c. Congress's desire to centralize the regulation of work-authorization status through IRCA is confirmed by the manner in which IRCA amended AWPA to harmonize the two statutes. See *Lorillard Tobacco* v. *Reilly*, 533 U.S. 525, 542 (2001) ("We are aided in our interpretation by considering the predecessor preemption provision and the circumstances in which the current language was adopted."). Prior to IRCA's

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[19] This generally has been true of farm labor contractor laws. *Supra* pp. 25-26 & note 13; *e.g.*, Cal. Lab. Code § 1690 (1986) (authorizing license suspension, revocation, or denial if a farm labor contractor "has been found, *by a court or the [U.S.] Secretary of Labor*, to have violated any provision of the Federal Farm Labor Contractor Registration Act"); 225 Ill. Comp. Stat. 505/6(d) (1986) (authorizing license suspension, revocation, or denial if a contractor "*has been convicted* of violating any provision of ... federal law").

It also remains true of numerous other state licensing regimes, including in Arizona. *E.g.*, Ariz. Rev. Stat. § 32-2124(M) (Department of Real Estate may not issue license to certain convicted felons); *id.* § 20-295(A)(13) (insurance producer's license may be suspended or revoked for violations of regulations governing premium finance companies).

enactment, AWPA contained its own independent prohibition on hiring unauthorized workers. 29 U.S.C. § 1816(a) (1985).[20] AWPA also provided for criminal penalties, *id.* § 1851, and a separate good-faith defense to a charge of knowingly hiring unauthorized workers, *id.* § 1816(b). The Secretary of Labor promulgated regulations addressing verification of work authorization, 29 C.F.R. §§ 500.58-.59 (1984), and adjudicated whether an employer had hired unauthorized workers. *E.g.*, *In re Garcia*, No. 86-MSP-107, 1991 WL 733599 (Sec'y of Labor Oct. 10, 1991). AWPA also specifically permitted complementary state regulation: "This chapter is intended to supplement State law, and compliance with this chapter shall not excuse any person from compliance with appropriate State law and regulation." 29 U.S.C. § 1871 (1985).

Congress repealed these separate prohibitions concerning employment status verification in a series of "conforming amendments" to AWPA. IRCA § 101(b). IRCA repealed AWPA's independent prohibition on unauthorized workers, and made corresponding changes to AWPA's defenses and penalties. *Id.* With these amendments, an AWPA registration certificate could be suspended or revoked based only on a predicate violation of IRCA—*i.e.*, if the employer "has been found to have violated" 8 U.S.C. § 1324a(a). *Id.* And, Congress added the separate provision of IRCA expressly preempting state laws (which previously had been allowed under AWPA's broad savings clause), with only the limited exception for "licensing"

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[20] AWPA was the successor to the Farm Labor Contractor Registration Act, Pub. L. No. 88-582, 78 Stat. 920 (1964), which, as amended, also independently prohibited the hiring of unauthorized workers. 7 U.S.C. §§ 2044(b)(6), 2045(f) (1976).

schemes. *Id.* § 101(a)(1) (codified at 8 U.S.C. § 1324a(h)(2)).

This history confirms the narrow scope of the "licensing" exception. IRCA displaced alternate regimes—including those under federal law governing status verification. At the same time, it avoided interfering with the traditional authority of States and localities to enforce laws which, like AWPA, conditioned a license or registration to engage in the business of labor contracting on compliance with IRCA's fundamental prohibition on unauthorized workers. See H.R. Rep. No. 99-682(I), at 58 (describing "licensing" laws as those "concerning the suspension, revocation, or refusal to reissue a license to any person *who has been found to have violated the sanctions provisions in this legislation*"). Without the savings clause, local officials would have been unable to bar a labor contracting business found to have violated the federal prohibition on hiring unauthorized workers from operating within their jurisdiction, even though AWPA contemplated this very result. See 29 U.S.C. §§ 1813(a)(6), 1871. It was such authority that the savings clause was intended to preserve. See *Ouellette*, 479 U.S. at 497 ("This delineation of authority represents Congress' considered judgment as to the best method of serving the public interest and reconciling the often competing concerns"). Congress did not intend, however, to authorize States in the guise of "licensing" to return to adjudicating in this domain.

4. The Arizona Act Is Not A Licensing Or Similar Law.

Arizona's law departs wildly from any traditional understanding of a "licensing" law, and undertakes precisely the regulation of employment authorization that Congress meant to preempt. The Act does not speak to a company's fitness to engage in any particu-

lar type of business, and it establishes no conditions for issuing a "license" or registration of any sort. See Ariz. Rev. Stat. §§ 23-211 to 23-212.01.

Rather, in purpose and effect it establishes a regulatory system for determining employment authorization. It contains numerous provisions prohibiting the employment of unauthorized workers and establishing procedures for investigating and adjudicating violations thereof. See *supra* pp. 11-13. Yet it refers to a "license" only in those few sections that grant authority to state court judges to direct, as one among multiple possible penalties against the employer,[21] "the appropriate agencies to suspend [or] ... to permanently revoke all licenses that are held by the employer." Ariz. Rev. Stat. §§ 23-212(F), 23-212.01(F). And, even where the statute does authorize sanctions against what it terms "licenses," it does so through a special definition that is unlike the ordinary meaning of that term. The Act defines "license" to exclude "professional licenses," *id.* § 23-211(9)(c)(ii), and to include various foundational corporate documents that are not "licenses" in any common sense of the term, including a "transaction privilege tax license," and certificates of partnership and articles of incorporation, *id.* § 23-211(9)(b). Withdrawing a company's charter—the "business death penalty," J.A. 399—is not a traditional "licensing" sanction; it does not act against a license; and it is not anything Congress reasonably anticipated.

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[21] The Arizona Act also allows for several sanctions which, even under the Act's strained definition, do not affect a "license" at all, including an injunction directing the employer "to terminate the employment of all unauthorized aliens" and to file periodic status and compliance reports to county officials. Ariz. Rev. Stat. § 23-212(F).

In contrast to its merely incidental relationship to traditional licensure, the Arizona Act directly regulates the hiring of unauthorized workers. It establishes an independent state prohibition on hiring unauthorized workers, Ariz. Rev. Stat. § 23-212(A), creates an independent state process for investigating, adjudicating, and sanctioning violations of the state prohibition, *id.* § 23-212(B)-(J), and establishes independent standards for state judges to determine employment authorization status, even if that determination conflicts with the prior decision of a federal official, *id.* § 23-212(I). *Supra* pp. 11-13. Far from simply imposing "sanctions," much less a sanction in the sense of "licensing," the Arizona Act sets up its own competing regulatory and enforcement system.

The fact that Congress thought it necessary to repeal AWPA's separate prohibition concerning unauthorized workers belies any suggestion that IRCA meant to authorize each of the 50 States (and indeed every locality) to impose its own separate prohibition. See, *e.g.*, *Bates* v. *Dow Agrosciences LLC*, 544 U.S. 431, 451-53 (2005) (cautioning against an interpretation of a savings clause that would allow for "50 different [regulatory] regimes"); see also *Riegel* v. *Medtronic*, 552 U.S. 312, 326 (2008); *Buckman Co.* v. *Plaintiffs' Legal Comm.*, 531 U.S. 341, 350 (2001). To permit Arizona to regulate in this fashion, in the face of the careful balancing undertaken by Congress, is to permit IRCA "to destroy itself," *AT&T* v. *Cent. Office Tel.*, 524 U.S. 214, 228 (1998), and would violate the settled rule against "giv[ing] broad effect to saving clauses where doing so would upset the careful regulatory scheme established by federal law," *United States* v. *Locke*, 529 U.S. 89, 106 (2000).

B. The Unauthorized Worker Provisions Are Impliedly Preempted.

The unauthorized worker provisions of the Arizona Act also are impliedly preempted. The existence of an express preemption provision (or savings clause) does not "bar the ordinary working of conflict preemption principles," or impose any "special burden" on demonstrating preemption. *Geier* v. *Am. Honda Motor Co.*, 529 U.S. 861, 869-72 (2000); see *Buckman*, 531 U.S. at 348-51; *Altria*, 129 S. Ct. at 543; *Freightliner Corp.* v. *Myrick*, 514 U.S. 280, 287-89 (1995); see also *Wyeth* v. *Levine*, 129 S. Ct. 1187, 1220 (2009) (Alito, J., dissenting); *Rush Prudential HMD* v. *Moran*, 536 U.S. 355, 392-93 (2002) (Thomas, J., dissenting); *Cipollone* v. *Liggett Group*, 505 U.S. 504, 547-48 (1992) (Scalia, J., dissenting). Rather, the question here, as in any other implied preemption case, is whether the state statute "conflicts" with the federal scheme, either because the federal and state statutes create contradictory rights or obligations, or because the state statute otherwise frustrates the federal scheme. *Geier*, 529 U.S. at 872-74; see also *Wyeth*, 129 S. Ct. at 1215-16 (Thomas, J., dissenting).

Arizona's unauthorized worker provisions establish an investigatory and adjudicatory process at odds with the procedures set forth in IRCA, and they disrupt the careful balance that Congress struck among competing interests when it enacted IRCA. For both of those reasons, the Arizona Act is impliedly preempted.

1. The Unauthorized Worker Provisions Conflict With IRCA's Structure And Operation.

a. There is "clear evidence" that, with respect to employment authorization, "Congress intended to

centralize all authority over the regulated area in one decisionmaker: the Federal Government." *Buckman*, 531 U.S. at 352; *Freightliner*, 514 U.S. at 292. As set forth above in the context of express preemption, see *supra* pp. 28-34,[22] IRCA contemplates a predicate federal adjudication by expert federal officials. And more generally, it creates a detailed process for investigating and adjudicating issues related to work-authorization status. *Supra* pp. 4-6. Befitting a regime implicating immigration status, IRCA directs "the Attorney General of the United States" to define the classes of individuals who are "authorized" to be employed in this country, to establish procedures governing the submission of complaints alleging unauthorized worker violations, and to promulgate rules "for the investigation of those complaints which, on their face, have substantial probability of validity." 8 U.S.C. § 1324a(e), (h)(3).

The statute accords "authority in investigations" only to "immigration officers," "administrative law judges," and "the Attorney General." *Id.* § 1324a(e)(1)-(2). It prohibits the imposition of sanctions until "the Attorney General ... provide[s] the person or entity with notice and, upon request made within a reasonable time[,] ... a hearing respecting the violation," *id.* § 1324a(e)(3), which must be held before an "administrative law judge" and conducted "in accordance with the requirements of the [Admin-

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[22] *English* v. *Gen. Elec.*, 496 U.S. 72, 79 n.5 (1990) ("By referring to these three categories [of express, field, and conflict preemption], we should not be taken to mean that they are rigidly distinct."), *quoted in Crosby*, 530 U.S. at 372 & n.6; *cf.* 1 L. Tribe, *American Constitutional Law* 1177 (3d ed. 2000) ("field" preemption may fall into any of the categories of express, implied, or conflict preemption).

istrative Procedure Act]," *id.* IRCA also guarantees the employer the right to petition for review of an adverse order "in the Court of Appeals for the appropriate circuit." *Id.* § 1324a(e)(8).

There is no room in this scheme for alternative investigatory and adjudicatory systems. See *Geier*, 529 U.S. at 883 ("Congress has delegated to [a federal agency] authority to implement the statute; the subject matter is technical; and the relevant history and background are complex and extensive"); see also *Merrill Lynch, Pierce, Fenner & Smith Inc.* v. *Dabit*, 547 U.S. 71, 85-87 (2006) (same). Such a system would be managed by state officials, rather than the federal officials specifically granted authority under IRCA. They would be conducted under procedures that do not provide the safeguards required under IRCA, including notice and a hearing by the U.S. Attorney General, and would not be subject to oversight by federal immigration officials. They would also deny to employers the right to seek federal appellate review that is guaranteed to them by federal law.[23]

The Arizona Act illustrates vividly why Congress properly intended the federal system to be exclusive. Rather than investigation by federal officials expert in matters of immigration, the Arizona Act directs state officials—including the local county attorney—to investigate, assisted by "[t]he county sheriff or other local law enforcement agency." Ariz. Rev. Stat. § 23-212(B). Upon finding that a complaint is "not

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[23] *See Adams Fruit* v. *Barrett*, 494 U.S. 638, 649-50 (1996) (state law that denies right accorded under federal law is preempted); *Barnett Bank of Marion County, N.A.* v. *Nelson*, 517 U.S. 25, 32-33 (1996) (same); *de la Cuesta*, 458 U.S. at 154-59 (same); *Lawrence County* v. *Lead-Deadwood Sch. Dist. No. 40-1*, 469 U.S. 256, 267-68 (1985) (same).

false and frivolous," the investigating official must notify both "the United States immigration and customs enforcement" and "the local law enforcement agency" of the identity "of the unauthorized alien," and the attorney general must "notify the appropriate county attorney to bring an action." *Id.* §§ 23-212(C), 23-212.01(C). The action is not adjudicated before an agency expert in the complicated questions of citizenship status or work-authorization status, *e.g.*, *supra* pp. 4-6 & note 2 (examples of federal regulations governing work authorization), but in state superior court "in the county where the unauthorized alien employee is or was employed." Ariz. Rev. Stat. § 23-212(C)-(D). There is no explicit procedure for further judicial review, see *id.* § 23-212(E), and certainly not through the federal courts of appeals as guaranteed by IRCA.

The Arizona Act demonstrates the mischief that has been and will be wrought if States are permitted under the cover of "licensing" to create their own separate systems for adjudicating violations of IRCA (or, as here, of similar state prohibitions). Most strikingly, the Arizona Act purports to authorize state officials to disregard federal findings concerning federal work-authorization status. An Arizona state court evaluating an alleged violation will accord "the federal government's determination" of work-authorization status only "a *rebuttable presumption* of the employee's lawful status." *Id.* § 23-212(H). This provision flatly contradicts IRCA's provisions placing responsibility for status determination with federal officials, and violates the longstanding principle that "federal power in the field affecting foreign relations"—particularly the conditions for admission of individuals into this country—"be left entirely free from local interference." *Am. Ins. Ass'n* v. *Garamen-*

di, 539 U.S. 396, 418 (2003) (quoting *Hines*, 312 U.S. at 63); see also *Chy Lung* v. *Freeman*, 92 U.S. 275, 280 (1875) ("The passage of laws which concern the admission of citizens and subjects of foreign nations to our shores belongs to Congress, and not to the States.").

Compounding this fundamental defect, and confirming the incoherence of Arizona's scheme, is the fashion in which Arizona's evaluation of work-authorization status is tied to "the federal government's determination pursuant to 8 [U.S.C. §] 1373(c)." Ariz. Rev. Stat. § 23.212(H). Section 1373(c) provides for no "determination" by the federal government at all, and it is wholly separate from the detailed procedure required under federal law to determine whether an employer knowingly hired an unauthorized worker. Rather, § 1373(c) directs federal officials to disclose "information," and it is the wrong information at that: Section 1373(c) has the federal government disclose information concerning an individual's "citizenship or immigration status"—not "employment authorization" or "employment eligibility," as would be relevant to determining work-authorization status.[24] Work-authorization status and immigration status are separate inquiries, and although certain categories of immigration status can determine employment authorization, *e.g.*, 8 C.F.R. § 274a.12(a), in numerous circumstances individuals

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[24] *See* Privacy Act of 1974; System of Records, 66 Fed. Reg. 46,812, 46,812, 46,815 (Sept. 7, 2001); *see also* 8 U.S.C. § 1254a (distinguishing between "immigration status" and "work authorization"); 8 C.F.R. pt. 274a, subpt. B (addressing "Employment Authorization"); Privacy Act of 1974; USCIS–004 Verification Information System (VIS) System of Records Notice, 73 Fed. Reg. 75,445, 75,448 (Dec. 11, 2008) (same).

without status under the immigration laws are authorized to work. *Supra* note 2. In addition, the information provided in response to a § 1373 request does not necessarily reflect the individual's authorization status *at the time of employment*, see 66 Fed. Reg. at 46,812-15, and thus cannot properly be relied upon to support an alleged violation of an unauthorized worker prohibition.

Moreover, the Arizona Act calls for the use of employment verification information in ways that Congress proscribed. Under IRCA, the I-9 form and "any information contained in or appended to" it "may not be used for purposes other than for enforcement of this chapter" and specified federal criminal laws. 8 U.S.C. § 1324a(b)(5); see also *id.* § 1324a(b)(4) (limiting copying and retention of identification documents); *id.* § 1324a(d)(2)(F) (similar prohibition on use of I-9 system; specifically forbidding use of information for "law enforcement purposes"); IIRIRA § 404(h)(1) (similar prohibition on use of E-Verify system). Yet, the Arizona Act has critical aspects of its regulatory scheme turn on questions—such as proof of compliance with the I-9 process and with E-Verify—that would require the use of just such information, contrary to the federal prohibition. Ariz. Rev. Stat. §§ 23-212(J); see also *id.* § 23-212(C)-(D) (requiring that information be shared with "local law enforcement agency").

b. Finally, Arizona's unauthorized worker regime disrupts the balance that Congress struck among its various policy objectives. "An interpretation of the saving clause that preserved actions brought under [the] State's law would disrupt this balance of interests." *Ouellette*, 479 U.S. at 494-96.

One of those objectives—but only one—was to deter unlawful immigration. 8 U.S.C. § 1324a(a); see also,

e.g., H.R. Rep. No. 99-682(I), at 51-56; S. Rep. No. 99-132, at 1, 18-26. Congress, however, did not intend to pursue enforcement at all costs. It also gave effect to other objectives, some of which would be impaired by a strategy of maximal enforcement. H.R. Rep. No. 99-682(I), at 56; S. Rep. No. 99-132, at 8-9. For instance, Congress intended to minimize burdens on employers. See, *e.g.*, IRCA § 101(a)(1) (codified at 8 U.S.C. § 1324a(j)(1)(c) (1986)) (requiring GAO to study, and issue reports concerning, whether "an unnecessary regulatory burden has been created for employers"). To that end, Congress established a verification system that allows employers to rely on facially reasonable documents as proof of employment authorization status. 8 U.S.C. § 1324a(a)(3), (b)(1); see S. Rep. No. 99-132, at 10-12, 32; H.R. Rep. No. 99-682(I), at 52-56, 60-62. Employers would not bear the burden of verifying that the documents presented by the employee actually were valid, and would benefit from a good-faith defense for following the statutory requirements. 8 U.S.C. § 1324a(a)(3), (b)(1)(A), (b)(6). Congress likewise sought to protect the privacy of prospective employees, and so permitted individuals to select the form of documentation with which to establish authorization status; prohibited employers from asking for additional documentation; and barred immigration authorities from establishing a "national identification card." *Id.* § 1324a(b)(1), (b)(2), (c); see H.R. Rep. No. 99-682(I), at 49, 68.

Perhaps most significant, Congress was deeply concerned that too heavy a thumb on the side of enforcement would cause employers to discriminate against prospective employees on the basis of actual or perceived national origin. *Supra* pp. 6-8. This concern was behind Congress's prohibition against employers asking for additional proof of identity or

employment authorization. *Supra* pp. 7-8. Congress in IRCA also expressly and independently "prohibit[ed] ... discrimination based on national origin or citizenship status." 8 U.S.C. § 1324b. And, for this same reason, Congress created a graduated schedule of civil monetary penalties for discrimination violations that matches precisely the penalties available for unauthorized worker violations. See *id.* § 1324b(g)(2)(B)(iv); *supra* p. 7; see also, *e.g.*, H.R. Conf. Rep. No. 99-1000, at 87 ("The antidiscrimination provisions of this bill are a complement to the sanctions provisions, and must be considered in that context."); H.R. Rep. No. 99-682(I), at 49, 68 (same).

Finally, Congress considered and balanced the respective roles of federal and state regulation. 8 U.S.C. § 1324a(h)(2). Immigration and employment authorization are matters of national concern properly subject to federal governance. States and localities, however, have traditional authority over licensing. And, States in the past had relied on federal findings of violations of federal law—including federal immigration law—as predicates for registration and licensing schemes, particularly in the field of farm labor contracting. See H.R. Rep. No. 99-682(I), at 58. Congress therefore allowed States to deny or revoke such licenses and similar registrations based on a violation of IRCA. See 8 U.S.C. § 1324a(h)(2). The narrowness of this exception reflects again the care that Congress took in balancing all of the relevant interests, and its concern that additional sanctions—beyond those associated with traditional "licensing" decisions—would disrupt the federal system. H.R. Rep. No. 99-682(I), at 58; S. Rep. No. 99-132, at 8-12 (level of sanctions is reasonable in light of competing concerns); see also H.R. Conf. Rep. No. 99-1000, at 86 (detailing graduated sanctions scheme).

It is inconceivable that, having resolved for itself the appropriate balance of these competing interests, Congress intended—through the oblique reference to "licensing"—to permit States to re-weigh those interests and craft a different system, with different adjudicatory standards and different penalties. "Where," as here, "it is clear how the [federal] laws strike that [congressional] balance in a particular circumstance, that is not a judgment the States may second-guess." *Bonito Boats*, 489 U.S. at 152. This is precisely what Arizona has done.

Arizona's statute pursues a single goal—the prevention of unlawful immigration—to the exclusion of all others. It has adopted an enforcement-at-all-costs strategy, with the solitary goal of "stop[ping] illegal immigration." J.A. 395. "[T]he inconsistency of sanctions here undermines the congressional calibration of force." *Crosby*, 530 U.S. at 380; cf. *Am. Ins. Ass'n*, 539 U.S. at 427 ("The basic fact is that [the State] seeks to use an iron fist where the President has consistently chosen kid gloves."). Arizona has not made even a passing nod to the other considerations that Congress weighed and sought to effectuate. The Arizona Act includes no anti-discrimination provision concerning employers—a fact that concerned Governor Napolitano when she signed the legislation, J.A. 399. And, considerations of limiting burdens on employers never have entered the picture; on the contrary, Arizona's chosen method is the *in terrorem* effect of the "business death penalty." In these ways, the Arizona system "exert[s] an extraneous pull on the scheme established by Congress, and is therefore pre-empted by that scheme." *Buckman*, 531 U.S. at 353.

That Arizona purports to share *one* of the concerns that motivated Congress—enforcement of the unau-

thorized worker prohibition—does not mean that it may re-craft federal policy to single-mindedly pursue its own preferred goal by its own preferred methods. "When Congress has taken the particular subject-matter in hand coincidence is as ineffective as opposition, and a state law is not to be declared a help because it attempts to go farther than Congress has seen fit to go." *Locke*, 529 U.S. at 115; *Crosby*, 530 U.S. at 379 ("The fact of a common end hardly neutralizes conflicting means ....").[25] The Arizona Act "go[es] farther than Congress has seen fit to go," and is thus preempted.

2. *De Canas* Does Not Require A Different Result.

The decisions below interpreted this Court's decision in *De Canas* as holding that unauthorized worker provisions like those enacted by Arizona cannot be impliedly preempted by federal law. Pet. App. 39a-40a, 67a-68a, 73a. This reflects a fundamental misunderstanding of *De Canas* and subsequent changes in federal immigration law.

The legal landscape that *De Canas* surveyed is utterly unlike the one that exists today. *De Canas* was decided in 1976, a decade before the passage of IRCA, and held that *at that time* federal immigration law

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[25] *Fla. Lime & Avocado Growers v. Paul*, 373 U.S. 132, 142 (1963) ("The test of whether both federal and state regulations may operate, or the state regulation must give way, is whether both regulations can be enforced without impairing the federal superintendence of the field, not whether they are aimed at similar or different objectives."); *see Foster*, 522 U.S. at 73 (Congress may "remedy more than one evil" at a time); *see also Wyeth*, 129 S. Ct. at 1215 ("[I]t frustrates rather than effectuates legislative intent simplistically to assume that *whatever* furthers the statute's primary objective must be the law.").

evinced "at best ... a peripheral concern with employment of illegal entrants." 424 U.S. at 360. IRCA amended federal immigration law to fill precisely this gap. It made the regulation of unauthorized workers "forcefully" the subject of federal law, *Nat'l Ctr. for Immigrants' Rights*, 502 U.S. at 194 n.8; see also *Hoffman*, 535 U.S. at 152, and expressly preempted state systems imposing sanctions for unauthorized worker violations, 8 U.S.C. § 1324a(h)(2). Nothing demonstrates more clearly the limited current relevance of *De Canas* than the fact that the state statute there at issue—which imposed fines for employers found to hire unauthorized workers, see 424 U.S. at 352 n.1—now is expressly preempted by § 1324a(h)(2). Moreover, *De Canas* involved field preemption, not conflict preemption. *Id.* at 356-58. And, finally, *De Canas* relied upon a provision of the Farm Labor Contractor Registration Act that saved state authority, *id.* at 361-62; see *Toll* v. *Moreno*, 458 U.S. 1, 13 n.18 (1982), and which subsequently was limited by IRCA itself, *supra* pp. 32-34 & note 20. Given the fundamentally different context in which *De Canas* arose, it is not controlling here.

II. ARIZONA'S E-VERIFY MANDATE IS IMPLIEDLY PREEMPTED.

Arizona further requires employers to participate in the federal E-Verify program that federal law explicitly makes voluntary. Ariz. Rev. Stat. § 23-214. That mandate conflicts with federal law, and therefore is preempted.

1. There can be no doubt that Congress intended E-Verify to operate as a voluntary program, in which employers could choose whether to participate. The statutory provision defining the program's applicability is titled "*Voluntary* Election to Participate in a Pilot Program." IIRIRA § 402. The statute provides

that employers "may *elect* to participate in that pilot program." *Id.* § 402(a); see also *id.* § 402(c)(2)(A) (a participating employer is an "electing person"). And the Secretary of Homeland Security—the official authorized under IIRIRA to administer the program—is expressly prohibited from "requir[ing] any person or other entity to participate" in E-Verify, *id.* § 402(a), and is further directed to "widely publicize ... the *voluntary* nature of the pilot programs," *id.* § 402(d)(2); accord *id.* § 402(d)(3)(A). Everything about E-Verify is voluntary, other than a small handful of specified exceptions,[26] the enumeration of which demonstrates the otherwise blanket nature of the rule. *Id.* § 402; see *O'Melveny & Myers* v. *FDIC*, 512 U.S. 79, 86 (1994) ("*Inclusio unius, exclusio alterius.*").

Congress made E-Verify voluntary for good reasons. It was designed as a "pilot program"—temporary and experimental in nature—to test as a possible alternative to the document-based I-9 process. IIRIRA § 402. By making the program voluntary, Congress could avoid imposing serious burdens on employers and the federal government while it tested whether the new program effectively served Congress's multiple goals, including "assist[ing] employers in complying with

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[26] E-Verify is mandatory for certain entities within the federal government, *see* IIRIRA § 402(e)(1), and under IIRIRA § 402(e)(2) one who violates specified provisions of IRCA may be required under an IRCA enforcement order to participate in a pilot program. The federal government also by rule has made E-Verify mandatory for certain federal contractors. *See* Employment Eligibility Verification, 73 Fed. Reg. 67,651 (Nov. 14, 2008). Over a legal challenge, a district court held, among other things, that the rule did not make E-Verify "mandatory" because a business always can choose not to undertake government contracting. *See Chamber of Commerce* v. *Napolitano*, 648 F. Supp. 2d 726, 736 (D. Md. 2009).

the laws" against hiring unauthorized aliens, "prevent[ing] unlawful discrimination and privacy violations," and "minimiz[ing] the burden on business." S. Rep. No. 104-249, at 9 (1996). It could also thereby assess any problems with E-Verify, to determine whether it ever could prove workable for employers.[27] For all of these reasons, Congress deliberately made the I-9 process (with a variety of document-based verification methods) mandatory, and created E-Verify as a voluntary and experimental system, which em-

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[27] A recent DHS-commissioned study of E-Verify found that foreign-born, work-authorized individuals were 20 times more likely to receive an erroneous tentative nonconfirmation than U.S.-born individuals and, notably, that States that require the use of E-Verify have higher error rates than employers in States with no such requirement. Westat, *Findings of the E-Verify Program Evaluation* 122, 235 (Dec. 2009), *available at* http://www.uscis.gov/USCIS/E-Verify/E-Verify/Final%20E-Verify%20Report%2012-16-09_2.pdf. These errors impose significant costs on employers and employees. Under federal law, an employer is not permitted to rely on a "tentative nonconfirmation" to take adverse action against the employee. IIRIRA § 403(a)(4)(B)(iii). The employer must allow the employee to lodge a challenge, and then must wait until a federal agency has resolved the challenge, before taking any action. *Id.* The burdens of this process are particularly acute for small businesses, which cannot afford significant delays in training and transitioning new employees. Westat, *Findings of the Web Basic Pilot Evaluation* xxii-xxiii, 24, 97 (Sept. 2007), *available at* http://www.uscis.gov/files/article/WebBasicPilotRprtSept2007.pdf. And, of course, employees who receive a "tentative nonconfirmation"—even if they later succeed in challenging that designation—can lose valuable training opportunities and may suffer harassment or other forms of discrimination. *Id.* While the most recent study of E-Verify reported improvement in the system's accuracy rates, the pattern of error reinforces why the program has remained voluntary and experimental. *See, e.g.*, H.R. Rep. No. 108-304(I), at 26-27 (2003) (statement by Rep. Berman regarding E-Verify error rates and consequences for employees).

ployers may choose to use—or not—in their discretion. See 8 U.S.C. § 1324a(b); 8 C.F.R. § 274a.2(b).

2. It is not for Arizona, or any other State, to disregard Congress's judgment. In enacting E-Verify as a voluntary program, Congress "weighed the competing interests relevant to the particular requirement in question, reached an unambiguous conclusion about how those competing considerations should be resolved in a particular case or set of cases, and implemented that conclusion via [federal law]." *Medtronic*, 518 U.S. at 501. It "deliberately sought variety" in the field of employment verification by approving "a mix of several different" options, including the mandatory I-9 process and the voluntary E-Verify program, to reach its regulatory goal. *Geier*, 529 U.S. at 878.

The Ninth Circuit concluded that this provision expressly limits only the *federal* government, and so does not apply to state statutes like Arizona's. Pet. App. 20a. In short, it concluded that what DHS Secretary Napolitano now is expressly forbidden from doing as a federal official, she—and her fellow 49 governors—were free to do as state executives. Nothing in IIRIRA supports this counterintuitive result.

That IIRIRA explicitly precludes only the "Secretary of Homeland Security" from mandating participation in E-Verify does not suggest that States are free to alter E-Verify requirements or mandate participation. E-Verify is a federally created program, administered exclusively by federal authorities. See *Buckman*, 531 U.S. at 347 ("[T]he relationship between a federal agency and the entity it regulates is inherently federal in character because the relationship originates from, is governed by, and terminates according to federal law."). Indeed, if the 49 other States followed Arizona's lead, the state-mandated

drain on federal resources would overwhelm the federal system and render it completely ineffective, thereby defeating Congress's primary objective in establishing E-Verify. See, *e.g.*, *Bates*, 544 U.S. at 451-53 (noting potential burdens imposed by "50 different [regulatory] regimes"); see also *Riegel*, 552 U.S. at 322; *Buckman*, 531 U.S. at 351. There is simply no reason to believe that Congress anticipated that States would have any role in enforcing E-Verify.

In this light, the fact that IIRIRA refers only to the Secretary of Homeland Security makes perfect sense: the Secretary is the only official authorized under IIRIRA to administer the program, and the only one potentially empowered to mandate participation in E-Verify. See IIRIRA § 402. Far from suggesting a broad exception for States to mandate E-Verify participation, the provision confirms Congress's understanding that other officials—particularly state officials—would lack authority to administer or mandate participation in E-Verify.

The E-Verify mandate of the Arizona Act, like the unauthorized worker provisions, conflicts with the language, structure, and intent of federal immigration law. The state law is therefore preempted.

CONCLUSION

For these reasons, the Court should reverse the decision of the Court of Appeals for the Ninth Circuit with instructions to vacate the judgment of the District Court.

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STATUTORY ADDENDUM

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8 U.S.C. § 1324b. Unfair immigration-related employment practices

(a) Prohibition of discrimination based on national origin or citizenship status

(1) General rule

It is an unfair immigration-related employment practice for a person or other entity to discriminate against any individual (other than an unauthorized alien, as defined in section 1324a(h)(3) of this title) with respect to the hiring, or recruitment or referral for a fee, of the individual for employment or the discharging of the individual from employment—

(A) because of such individual's national origin, or

(B) in the case of a protected individual (as defined in paragraph (3)), because of such individual's citizenship status.

(2) Exceptions

Paragraph (1) shall not apply to—

(A) a person or other entity that employs three or fewer employees,

(B) a person's or entity's discrimination because of an individual's national origin if the discrimination with respect to that person or entity and that individual is covered under section 703 of the Civil Rights Act of 1964 [42 U.S.C.A. § 2000e-2], or

(C) discrimination because of citizenship status which is otherwise required in order to comply with law, regulation, or executive order, or re-

quired by Federal, State, or local government contract, or which the Attorney General determines to be essential for an employer to do business with an agency or department of the Federal, State, or local government.

(3) "Protected individual" defined

As used in paragraph (1), the term "protected individual" means an individual who—

(A) is a citizen or national of the United States, or

(B) is an alien who is lawfully admitted for permanent residence, is granted the status of an alien lawfully admitted for temporary residence under section 1160(a) or 1255a(a)(1) of this title, is admitted as a refugee under section 1157 of this title, or is granted asylum under section 1158 of this title; but does not include (i) an alien who fails to apply for naturalization within six months of the date the alien first becomes eligible (by virtue of period of lawful permanent residence) to apply for naturalization or, if later, within six months after November 6, 1986, and (ii) an alien who has applied on a timely basis, but has not been naturalized as a citizen within 2 years after the date of the application, unless the alien can establish that the alien is actively pursuing naturalization, except that time con-sumed in the Service's processing the application shall not be counted toward the 2-year period.

(4) Additional exception providing right to prefer equally qualified citizens

Notwithstanding any other provision of this section, it is not an unfair immigration-related employment practice for a person or other entity to prefer to hire, recruit, or refer an individual who is

a citizen or national of the United States over another individual who is an alien if the two individuals are equally qualified.

(5) Prohibition of intimidation or retaliation

It is also an unfair immigration-related employment practice for a person or other entity to intimidate, threaten, coerce, or retaliate against any individual for the purpose of interfering with any right or privilege secured under this section or because the individual intends to file or has filed a charge or a complaint, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this section. An individual so intimidated, threatened, coerced, or retaliated against shall be considered, for purposes of subsections (d) and (g) of this section, to have been discriminated against.

(6) Treatment of certain documentary practices as employment practices

A person's or other entity's request, for purposes of satisfying the requirements of section 1324a(b) of this title, for more or different documents than are required under such section or refusing to honor documents tendered that on their face reasonably appear to be genuine shall be treated as an unfair immigration-related employment practice if made for the purpose or with the intent of discriminating against an individual in violation of paragraph (1).

(b) Charges of violations

(1) In general

Except as provided in paragraph (2), any person alleging that the person is adversely affected directly by an unfair immigration-related employ-ment practice (or a person on that person's behalf) or an

officer of the Service alleging that an unfair immigration-related employment practice has occurred or is occurring may file a charge respecting such practice or violation with the Special Counsel (appointed under subsection (c) of this section). Charges shall be in writing under oath or affirmation and shall contain such information as the Attorney General requires. The Special Counsel by certified mail shall serve a notice of the charge (including the date, place, and circumstances of the alleged unfair immigration-related employment practice) on the person or entity involved within 10 days.

(2) No overlap with EEOC complaints

No charge may be filed respecting an unfair immigration-related employment practice described in subsection (a)(1)(A) of this section if a charge with respect to that practice based on the same set of facts has been filed with the Equal Employment Opportunity Commission under title VII of the Civil Rights Act of 1964 [42 U.S.C.A. § 2000e et seq.], unless the charge is dismissed as being outside the scope of such title. No charge respecting an employment practice may be filed with the Equal Employment Opportunity Commission under such title if a charge with respect to such practice based on the same set of facts has been filed under this subsection, unless the charge is dismissed under this section as being outside the scope of this section.

(c) Special Counsel

(1) Appointment

The President shall appoint, by and with the advice and consent of the Senate, a Special Counsel for Immigration-Related Unfair Employment Practices (hereinafter in this section referred to as the "Spe-

cial Counsel") within the Department of Justice to serve for a term of four years. In the case of a vacancy in the office of the Special Counsel the President may designate the officer or employee who shall act as Special Counsel during such vacancy.

(2) Duties

The Special Counsel shall be responsible for investigation of charges and issuance of complaints under this section and in respect of the prosecution of all such complaints before administrative law judges and the exercise of certain functions under subsection (j)(1) of this section.

(3) Compensation

The Special Counsel is entitled to receive compensation at a rate not to exceed the rate now or hereafter provided for grade GS-17 of the General Schedule, under section 5332 of Title 5.

(4) Regional offices

The Special Counsel, in accordance with regulations of the Attorney General, shall establish such regional offices as may be necessary to carry out his duties.

(d) Investigation of charges

(1) By Special Counsel

The Special Counsel shall investigate each charge received and, within 120 days of the date of the receipt of the charge, determine whether or not there is reasonable cause to believe that the charge is true and whether or not to bring a complaint with respect to the charge before an administrative law judge. The Special Counsel may, on his own initiative, conduct investigations respecting unfair immigration-related employment practices and, based

on such an investigation and subject to paragraph (3), file a complaint before such a judge.

(2) Private actions

If the Special Counsel, after receiving such a charge respecting an unfair immigration-related employment practice which alleges knowing and intentional discriminatory activity or a pattern or practice of discriminatory activity, has not filed a complaint before an administrative law judge with respect to such charge within such 120-day period, the Special Counsel shall notify the person making the charge of the determination not to file such a complaint during such period and the person making the charge may (subject to paragraph (3)) file a complaint directly before such a judge within 90 days after the date of receipt of the notice. The Special Counsel's failure to file such a complaint within such 120-day period shall not affect the right of the Special Counsel to investigate the charge or to bring a complaint before an administrative law judge during such 90-day period.

(3) Time limitations on complaints

No complaint may be filed respecting any unfair immigration-related employment practice occurring more than 180 days prior to the date of the filing of the charge with the Special Counsel. This subparagraph shall not prevent the subsequent amending of a charge or complaint under subsection (e)(1) of this section.

(c) Hearings

(1) Notice

Whenever a complaint is made that a person or entity has engaged in or is engaging in any such unfair immigration-related employment practice,

an administrative law judge shall have power to issue and cause to be served upon such person or entity a copy of the complaint and a notice of hearing before the judge at a place therein fixed, not less than five days after the serving of the complaint. Any such complaint may be amended by the judge conducting the hearing, upon the motion of the party filing the complaint, in the judge's discretion at any time prior to the issuance of an order based thereon. The person or entity so complained of shall have the right to file an answer to the original or amended complaint and to appear in person or otherwise and give testimony at the place and time fixed in the complaint.

(2) Judges hearing cases

Hearings on complaints under this subsection shall be considered before administrative law judges who are specially designated by the Attorney General as having special training respecting employment discrimination and, to the extent practicable, before such judges who only consider cases under this section.

(3) Complainant as party

Any person filing a charge with the Special Counsel respecting an unfair immigration-related employment practice shall be considered a party to any complaint before an administrative law judge respecting such practice and any subsequent appeal respecting that complaint. In the discretion of the judge conducting the hearing, any other person may be allowed to intervene in the proceeding and to present testimony.

(f) Testimony and authority of hearing officers

(1) Testimony

The testimony taken by the administrative law judge shall be reduced to writing. Thereafter, the judge, in his discretion, upon notice may provide for the taking of further testimony or hear argument.

(2) Authority of administrative law judges

In conducting investigations and hearings under this subsection[28] and in accordance with regulations of the Attorney General, the Special Counsel and administrative law judges shall have reasonable access to examine evidence of any person or entity being investigated. The administrative law judges by subpoena may compel the attendance of witnesses and the production of evidence at any designated place or hearing. In case of contumacy or refusal to obey a subpoena lawfully issued under this paragraph and upon application of the administrative law judge, an appropriate district court of the United States may issue an order requiring compliance with such subpoena and any failure to obey such order may be punished by such court as a contempt thereof.

(g) Determinations

(1) Order

The administrative law judge shall issue and cause to be served on the parties to the proceeding an order, which shall be final unless appealed as provided under subsection (i) of this section.

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[28] So in original. Probably should be "section".

(2) Orders finding violations

(A) In general

If, upon the preponderance of the evidence, an administrative law judge determines that any person or entity named in the complaint has engaged in or is engaging in any such unfair immigration-related employment practice, then the judge shall state his findings of fact and shall issue and cause to be served on such person or entity an order which requires such person or entity to cease and desist from such unfair immigration-related employment practice.

(B) Contents of order

Such an order also may require the person or entity—

(i) to comply with the requirements of section 1324a(b) of this title with respect to individuals hired (or recruited or referred for employment for a fee) during a period of up to three years;

(ii) to retain for the period referred to in clause (i) and only for purposes consistent with section 1324a(b)(5) of this title, the name and address of each individual who applies, in person or in writing, for hiring for an existing position, or for recruiting or referring for a fee, for employment in the United States;

(iii) to hire individuals directly and adversely affected, with or without back pay;

(iv)(I) except as provided in subclauses (II) through (IV), to pay a civil penalty of not less than $250 and not more than $2,000 for each individual discriminated against,

(II) except as provided in subclauses (III) and (IV), in the case of a person or entity

previously subject to a single order under this paragraph, to pay a civil penalty of not less than $2,000 and not more than $5,000 for each individual discriminated against,

(III) except as provided in subclause (IV), in the case of a person or entity previously subject to more than one order under this paragraph, to pay a civil penalty of not less than $3,000 and not more than $10,000 for each individual discriminated against, and

(IV) in the case of an unfair immigration-related employment practice described in subsection (a)(6) of this section, to pay a civil penalty of not less than $100 and not more than $1,000 for each individual discriminated against;

(v) to post notices to employees about their rights under this section and employers' obligations under section 1324a of this title;

(vi) to educate all personnel involved in hiring and complying with this section or section 1324a of this title about the requirements of this section or such section;

(vii) to remove (in an appropriate case) a false performance review or false warning from an employee's personnel file; and

(viii) to lift (in an appropriate case) any restrictions on an employee's assignments, work shifts, or movements.

(C) Limitation on back pay remedy

In providing a remedy under subparagraph (B)(iii), back pay liability shall not accrue from a date more than two years prior to the date of the filing of a charge with the Special Counsel. Inte-

rim earnings or amounts earnable with reasonable diligence by the individual or individ-uals discriminated against shall operate to reduce the back pay otherwise allowable under such paragraph. No order shall require the hiring of an individual as an employee or the payment to an individual of any back pay, if the individual was refused employment for any reason other than discrimination on account of national origin or citizenship status.

(D) Treatment of distinct entities

In applying this subsection in the case of a person or entity composed of distinct, physically separate subdivisions each of which provides separately for the hiring, recruiting, or referring for employment, without reference to the practices of, and not under the control of or common control with, another subdivision, each such subdivision shall be considered a separate person or entity.

(3) Orders not finding violations

If upon the preponderance of the evidence an administrative law judge determines that the person or entity named in the complaint has not engaged and is not engaging in any such unfair immigration-related employment practice, then the judge shall state his findings of fact and shall issue an order dismissing the complaint.

(h) Awarding of attorneys' fees

In any complaint respecting an unfair immigration-related employment practice, an administrative law judge, in the judge's discretion, may allow a prevailing party, other than the United States, a reasonable attorney's fee, if the losing party's argument is without reasonable foundation in law and fact.

(i) Review of final orders

(1) In general

Not later than 60 days after the entry of such final order, any person aggrieved by such final order may seek a review of such order in the United States court of appeals for the circuit in which the violation is alleged to have occurred or in which the employer resides or transacts business.

(2) Further review

Upon the filing of the record with the court, the jurisdiction of the court shall be exclusive and its judgment shall be final, except that the same shall be subject to review by the Supreme Court of the United States upon writ of certiorari or certification as provided in section 1254 of Title 28.

(j) Court enforcement of administrative orders

(1) In general

If an order of the agency is not appealed under subsection (i)(1) of this section, the Special Counsel (or, if the Special Counsel fails to act, the person filing the charge) may petition the United States district court for the district in which a violation of the order is alleged to have occurred, or in which the respondent resides or transacts business, for the enforcement of the order of the administrative law judge, by filing in such court a written petition praying that such order be enforced.

(2) Court enforcement order

Upon the filing of such petition, the court shall have jurisdiction to make and enter a decree enforcing the order of the administrative law judge. In such a proceeding, the order of the administrative law judge shall not be subject to review.

(3) Enforcement decree in original review

If, upon appeal of an order under subsection (i)(1) of this section, the United States court of appeals does not reverse such order, such court shall have the jurisdiction to make and enter a decree enforcing the order of the administrative law judge.

(4) Awarding of attorney's fees

In any judicial proceeding under subsection (i) of this section or this subsection, the court, in its discretion, may allow a prevailing party, other than the United States, a reasonable attorney's fee as part of costs but only if the losing party's argument is without reasonable foundation in law and fact.

(k) Termination dates

(1) This section shall not apply to discrimination in hiring, recruiting, or referring, or discharging of individuals occurring after the date of any termination of the provisions of section 1324a of this title, under subsection (l) of that section.

(2) The provisions of this section shall terminate 30 calendar days after receipt of the last report required to be transmitted under section 1324a(j) of this title if—

(A) the Comptroller General determines, and so reports in such report that--

(i) no significant discrimination has resulted, against citizens or nationals of the United States or against any eligible workers seeking employment, from the implementation of section 1324a of this title, or

(ii) such section has created an unreasonable burden on employers hiring such workers; and

(B) there has been enacted, within such period of 30 calendar days, a joint resolution stating in substance that the Congress approves the findings of the Comptroller General contained in such report.

The provisions of subsections (m) and (n) of section 1324a of this title shall apply to any joint resolution under subparagraph (B) in the same manner as they apply to a joint resolution under subsection (l) of such section.

(l) Dissemination of information concerning anti-discrimination provisions

(1) Not later than 3 months after November 29, 1990, the Special Counsel, in cooperation with the chairman of the Equal Employment Opportunity Commission, the Secretary of Labor, and the Administrator of the Small Business Admini-stration, shall conduct a campaign to disseminate information respecting the rights and remedies prescribed under this section and under title VII of the Civil Rights Act of 1964 [42 U.S.C.A. § 2000e et seq.] in connection with unfair immigration-related employment practices. Such campaign shall be aimed at increasing the knowledge of employers, employees, and the general public concerning employer and employee rights, responsibilities, and remedies under this section and such title.

(2) In order to carry out the campaign under this subsection, the Special Counsel—

(A) may, to the extent deemed appropriate and subject to the availability of appropriations, contract with public and private organizations for outreach activities under the campaign, and

(B) shall consult with the Secretary of Labor, the chairman of the Equal Employment Opportunity

Commission, and the heads of such other agencies as may be appropriate.

(3) There are authorized to be appropriated to carry out this subsection $10,000,000 for each fiscal year (beginning with fiscal year 1991).

29 U.S.C. § 1801 (1985). Congressional statement of purpose

It is the purpose of this chapter to remove the restraints on commerce caused by activities detrimental to migrant and seasonal agricultural workers; to require farm labor contractors to register under this Act; and to assure necessary protections for migrant and seasonal agricultural workers, agricultural associations, and agricultural employers.

29 U.S.C. § 1802 (1985). Definitions

As used in this chapter—

(1) The term "agricultural association" means any nonprofit or cooperative association of farmers, growers, or ranchers, incorporated or qualified under applicable State law, which recruits, solicits, hires, employs, furnishes, or transports any migrant or seasonal agricultural worker.

(2) The term "agricultural employer" means any person who owns or operates a farm, ranch, processing establishment, cannery, gin, packing shed or nursery, or who produces or conditions seed, and who either recruits, solicits, hires, employs, furnishes, or transports any migrant or seasonal agricultural worker.

(3) The term "agricultural employment" means employment in any service or activity included within the provisions of section 3(f) of the Fair Labor Standards Act of 1938 (29 U.S.C. 203(f)), or section 3121(g) of title 26 and the handling, planting, drying, packing, packaging, processing, freezing, or grading prior to delivery for storage of any agricultural or horticultural commodity in its unmanufactured state.

(4) The term "day-haul operation" means the assembly of workers at a pick-up point waiting to be hired

and employed, transportation of such workers to agricultural employment, and the return of such workers to a drop-off point on the same day.

(5) The term "employ" has the meaning given such term under section 3(g) of the Fair Labor Standards Act of 1938 (29 U.S.C. 203(g)) for the purposes of implementing the requirements of that Act [29 U.S.C. 201 et seq.].

(6) The term "farm labor contracting activity" means recruiting, soliciting, hiring, employing, furnishing, or transporting any migrant or seasonal agricultural worker.

(7) The term "farm labor contractor" means any person, other than an agricultural employer, an agricultural association, or an employee of an agricultural employer or agricultural association, who, for any money or other valuable consideration paid or promised to be paid, performs any farm labor contracting activity.

(8)(A) Except as provided in subparagraph (B), the term "migrant agricultural worker" means an individual who is employed in agricultural employment of a seasonal or other temporary nature, and who is required to be absent overnight from his permanent place of residence.

(B) The term "migrant agricultural worker" does not include—

(i) any immediate family member of an agricultural employer or a farm labor contractor; or

(ii) any temporary nonimmigrant alien who is authorized to work in agricultural employment in the United States under sections 101(a)(15)(H)(ii) and 214(c) of title 8.

(9) The term "person" means any individual, partnership, association, joint stock company, trust, cooperative, or corporation.

(10)(A) Except as provided in subparagraph (B), the term "seasonal agricultural worker" means an individual who is employed in agricultural employment of a seasonal or other temporary nature and is not required to be absent overnight from his permanent place of residence—

(i) when employed on a farm or ranch performing field work related to planting, cultivating, or harvesting operations; or

(ii) when employed in canning, packing, ginning, seed conditioning or related research, or processing operations, and transported, or caused to be transported, to or from the place of employment by means of a day-haul operation.

(B) The term "seasonal agricultural worker" does not include—

(i) any migrant agricultural worker;

(ii) any immediate family member of an agricultural employer or a farm labor contractor; or

(iii) any temporary nonimmigrant alien who is authorized to work in agricultural employment in the United States under sections 101(a)(15)(H)(ii) and 214(c) of title 8.

(11) The term "Secretary" means the Secretary of Labor or the Secretary's authorized representative.

(12) The term "State" means any of the States of the United States, the District of Columbia, the Virgin Islands, the Commonwealth of Puerto Rico, and Guam.

29 U.S.C. § 1803 (1985). Applicability of chapter

(a) The following persons are not subject to this chapter.

(1) FAMILY BUSINESS EXEMPTION.—Any individual who engages in a farm labor contracting activity on behalf of a farm, processing establishment, seed conditioning establishment, cannery, gin, packing shed, or nursery, which is owned or operated exclusively by such individual or an immediate family member of such individual, if such activities are performed only for such operation and exclusively by such individual or an immediate family member, but without regard to whether such individual has incorporated or otherwise organized for business purposes.

(2) SMALL BUSINESS EXEMPTION.—Any person, other than a farm labor contractor, for whom the man-days exemption for agricultural labor provided under section 13(a)(6)(A) of the Fair Labor Standards Act of 1938 (29 U.S.C. 213(a)(6)(A)) is applicable.

(3) OTHER EXEMPTIONS.—(A) Any common carrier which would be a farm labor contractor solely because the carrier is engaged in the farm labor contracting activity of transporting any migrant or seasonal agricultural worker.

(B) Any labor organization, as defined in section 2(5) of the Labor Management Relations Act (29 U.S.C. 152(5)) (without regard to the exclusion of agricultural employees in that Act [29 U.S.C. 141 et seq.]) or as defined under applicable State labor relations law.

(C) Any nonprofit charitable organization or public or private nonprofit educational institution.

(D) Any person who engages in any farm labor contracting activity solely within a twenty-five mile intrastate radius of such person's permanent place of residence and for not more than thirteen weeks per year.

(E) Any custom combine, hay harvesting, or sheep shearing operation.

(F) Any custom poultry harvesting, breeding, debeaking, desexing, or health service operation provided the employees of the operation are not regularly required to be away from their permanent place of residence other than during their normal working hours.

(G)(i) Any person whose principal occupation or business is not agricultural employment, when supplying full-time students or other individuals whose principal occupation is not agricultural employment to detassel, rogue, or otherwise engage in the production of seed and to engage in related and incidental agricultural employment, unless such full-time students or other individuals are required to be away from their permanent place of residence overnight or there are individuals under eighteen years of age who are providing transportation on behalf of such person.

(ii) Any person to the extent he is supplied with students or other individuals for agricultural employment in accordance with clause (i) of this subparagraph by a person who is exempt under such clause.

(H)(i) Any person whose principal occupation or business is not agricultural employment, when supplying full-time students or other individuals whose principal occupation is not agricultural employment to string or harvest shade grown tobacco

and to engage in related and incidental agricultural employment, unless there are individuals under eighteen years of age who are providing transportation on behalf of such person.

(ii) Any person to the extent he is supplied with students or other individuals for agricultural employ-ment in accordance with clause (i) of this subpara-graph by a person who is exempt under such clause.

(I) Any employee of any person described in subparagraphs (A) through (H) when performing farm labor contracting activities exclusively for such person.

(b) Subchapter I of the chapter does not apply to any agricultural employer or agricultural association or to any employee of such an employer or association.

29 U.S.C. § 1811 (1985). Certificate of registration required

(a) Persons engaged in any farm labor contracting activity

No person shall engage in any farm labor contracting activity, unless such person has a certificate of registration from the Secretary specifying which farm labor contracting activities such person is authorized to perform.

(b) Hire, employ, or use of any individual to perform farm labor contracting activities by farm labor contractor; liability of farm labor contractor for violations

A farm labor contractor shall not hire, employ, or use any individual to perform farm labor contracting activities unless such individual has a certificate of registration, or a certificate of registration as an employee of the farm labor contractor employer, which authorizes the activity for which such individual is hired, employed, or used. The farm labor contractor shall be held responsible for violations of this Act or any regulation under this Act by any employee regardless of whether the employee possesses a certificate of registration based on the contractor's certificate of registration.

(c) Possession and exhibition of certificate

Each registered farm labor contractor and registered farm labor contractor employee shall carry at all times while engaging in farm labor contracting activities a certificate of registration and, upon request, shall exhibit that certificate to all persons with whom they intend to deal as a farm labor contractor or farm labor contractor employee.

(d) Refusal or failure to produce certificate

The facilities and the services authorized by the Act of June 6, 1933 (29 U.S.C. 49 et seq.), known as the Wagner-Peyser Act, shall be denied to any farm labor contractor upon refusal or failure to produce, when asked, a certificate of registration.

29 U.S.C. § 1812 (1985). Issuance of certificate of registration

The Secretary, after appropriate investigation and approval, shall issue a certificate of registration (including a certificate of registration as an employee of a farm labor contractor) to any person who has filed with the Secretary a written application containing the following:

(1) a declaration, subscribed and sworn to by the applicant, stating the applicant's permanent place of residence, the farm labor contracting activities for which the certificate is requested, and such other relevant information as the Secretary may require;

(2) a statement identifying each vehicle to be used to transport any migrant or seasonal agricultural worker and, if the vehicle is or will be owned or controlled by the applicant, documentation showing that the applicant is in compliance with the requirements of section 401 with respect to each such vehicle;

(3) a statement identifying each facility or real property to be used to house any migrant agricultural worker and, if the facility or real property is or will be owned or controlled by the applicant, documentation showing that the applicant is in compliance with section 203 with respect to each such facility or real property;

(4) a set of fingerprints of the applicant; and

(5) a declaration, subscribed and sworn to by the applicant, consenting to the designation by a court of the Secretary as an agent available to accept service of summons in any action against the applicant, if the applicant has left the jurisdiction in

which the action is commenced or otherwise has become unavailable to accept service.

29 U.S.C. § 1813 (1985). Registration determinations

(a) Grounds for refusal to issue or renew, suspension, or revocation of certificate

In accordance with regulations, the Secretary may refuse to issue or renew, or may suspend or revoke, a certificate of registration (including a certificate of registration as an employee of a farm labor contractor) if the applicant or holder—

(1) has knowingly made any misrepresentation in the application for such certificate;

(2) is not the real party in interest in the application or certificate of registration and the real party in interest is a person who has been refused issuance or renewal of a certificate, has had a certificate suspended or revoked, or does not qualify under this section for a certificate;

(3) has failed to comply with this Act or any regulation under this Act;

(4) has failed—

(A) to pay any court judgment obtained by the Secretary or any other person under this Act or any regulation under this Act or under the Farm Labor Contractor Registration Act of 1963 or any regulation under such Act, or

(B) to comply with any final order issued by the Secretary as a result of a violation of this Act or any regulation under this Act or a violation of the Farm Labor Contractor Registration Act of 1963 or any regulation under such Act; or

(5) has been convicted within the preceding five years—

(A) of any crime under State or Federal law relating to gambling, or to the sale, distribution or possession of alcoholic beverages, in connection with or incident to any farm labor contracting activities; or

(B) of any felony under State or Federal law involving robbery, bribery, extortion, embezzlement, grand larceny, burglary, arson, violation of narcotics laws, murder, rape, assault with intent to kill, assault which inflicts grievous bodily injury, prostitution, peonage, or smuggling or harboring individuals who have entered the United States illegally.

(b) Administrative review procedures applicable

(1) The person who is refused the issuance or renewal of a certificate or whose certificate is suspended or revoked under subsection (a) shall be afforded an opportunity for agency hearing, upon request made within thirty days after the date of issuance of the notice of the refusal, suspension, or revocation. In such hearing, all issues shall be determined on the record pursuant to section 554 of title 5, United States Code. If no hearing is requested as herein provided, the refusal, suspension, or revocation shall constitute a final and unappealable order.

(2) If a hearing is requested, the initial agency decision shall be made by an administrative law judge, and such decision shall become the final order unless the Secretary modifies or vacates the decision. Notice of intent to modify or vacate the decision of the administrative law judge shall be issued to the parties within thirty days after the decision of the adminis-

trative law judge. A final order which takes effect under this paragraph shall be subject to review only as provided under subsection (c) of this section.

(c) Judicial review procedures available

Any person against whom an order has been entered after an agency hearing under this section may obtain review by the United States district court for any district in which he is located or the United States District Court for the District of Columbia by filing a notice of appeal in such court within thirty days from the date of such order, and simultaneously sending a copy of such notice by registered mail to the Secretary. The Secretary shall promptly certify and file in such court the record upon which the order was based. The findings of the Secretary shall be set aside only if found to be unsupported by substantial evidence as provided by section 706(2)(E) of title 5, United States Code. Any final decision, order, or judgment of such District Court concerning such review shall be subject to appeal as provided in chapter 83 of title 28.

29 U.S.C. § 1814 (1985). Transfer or assignment; expiration; renewal

(a) Transfer or assignment prohibited

A certificate of registration may not be transferred or assigned.

(b) Expiration; renewals

(1) Unless earlier suspended or revoked, a certificate shall expire twelve months from the date of issuance, except that (A) certificates issued under this Act during the period beginning December 1, 1982, and ending November 30, 1983, may be issued for a period of up to twenty-four months for the purpose of an order-

ly transition to registration under this Act, (B) a certificate may be temporarily extended by the filing of an application with the Secretary at least thirty days prior to its expiration date, and (C) the Secretary may renew a certificate for additional twelve-month periods or for periods in excess of twelve months but not in excess of twenty-four months.

(2) Eligibility for renewals for periods of more than twelve months shall be limited to farm labor contractors who have not been cited for a violation of this Act, or any regulation under this Act, or the Farm Labor Contractor Registration Act of 1963 [7 U.S.C. 2041 et seq.], or any regulation under such Act, during the preceding five years.

29 U.S.C. § 1815 (1985). Notice of address change; amendment of certificate of registration

During the period for which the certificate of registration is in effect, each farm labor contractor shall—

(1) provide to the Secretary within thirty days a notice of each change of permanent place of residence; and

(2) apply to the Secretary to amend the certificate of registration whenever the farm labor contractor intends to—

(A) engage in another farm labor contracting activity,

(B) use, or cause to be used, another vehicle than that covered by the certificate to transport any migrant or seasonal agricultural worker, or

(C) use, or cause to be used, another real property or facility to house any migrant agricultural worker than that covered by the certificate.

29 U.S.C. § 1816 (1985). Prohibition against employing illegal aliens

(a) No farm labor contractor shall recruit, hire, employ, or use, with knowledge, the services of any individual who is an alien not lawfully admitted for permanent residence or who has not been authorized by the Attorney General to accept employment

(b) A farm labor contractor shall be considered to have complied with subsection (a) if the farm labor contractor demonstrates that the farm labor contractor relied in good faith on documentation prescribed by the Secretary, and the farm labor contractor had no reason to believe the individual was an alien referred to in subsection (a).

29 U.S.C. § 1851 (1985). Criminal sanctions

(a) Violations of chapter or regulations

Any person who willfully and knowingly violates this Act or any regulation under this Act shall be fined not more than $1,000 or sentenced to prison for a term not to exceed one year, or both. Upon conviction for any subsequent violation of this Act or any regulation under this Act, the defendant shall be fined not more than $10,000 or sentenced to prison for a term not to exceed three years, or both.

(b) Violations of section 1324a(a) of title 8

If a farm labor contractor who commits a violation of section 106 has been refused issuance or renewal of, or has failed to obtain, a certificate of registration or is a farm labor contractor whose certificate has been suspended or revoked, the contractor shall, upon conviction, be fined not more than $10,000 or sentenced to prison for a term not to exceed three years, or both.

29 U.S.C. § 1852 (1985). Judicial enforcement

(a) Injunctive relief

The Secretary may petition any appropriate district court of the United States for temporary or permanent injunctive relief if the Secretary determines that this Act, or any regulation under this Act, has been violated.

(b) Control of civil litigation

Except as provided in section 518(a) of title 28, United States Code, relating to litigation before the Supreme Court, the Solicitor of Labor may appear for and represent the Secretary in any civil litigation brought under this Act, but all such litigation shall be subject to the direction and control of the Attorney General.

29 US.C. § 1853 (1985). Administrative sanctions

(a) Civil money penalties for violations; criteria for assessment

(1) Subject to paragraph (2), any person who commits a violation of this Act or any regulation under this Act, may be assessed a civil money penalty of not more than $1,000 for each violation.

(2) In determining the amount of any penalty to be assessed under paragraph (1), the Secretary shall take into account (A) the previous record of the person in terms of compliance with this Act and with comparable requirements of the Farm Labor Contractor Registration Act of 1963, and with regulations promulgated under such Acts, and (B) the gravity of the violation.

(b) Administrative review

(1) The person assessed shall be afforded an opportunity for agency hearing, upon request made within thirty days after the date of issuance of the notice of assessment. In such hearing, all issues shall be determined on the record pursuant to section 554 of title 5, United States Code. If no hearing is requested as herein provided, the assessment shall constitute a final and unappealable order.

(2) If a hearing is requested, the initial agency decision shall be made by an administrative law judge, and such decision shall become the final order unless the Secretary modifies or vacates the decision. Notice of intent to modify or vacate the decision of the administrative law judge shall be issued to the parties within thirty days after the decision of the administrative law judge. A final order which takes effect under this paragraph shall be subject to review only as provided under subsection (c) of this section.

(c) Judicial review

Any person against whom an order imposing a civil money penalty has been entered after an agency hearing under this section may obtain review by the United States district court for any district in which he is located or the United States District Court for the District of Columbia by filing a notice of appeal in such court within thirty days from the date of such order, and simultaneously sending a copy of such notice by registered mail to the Secretary. The Secretary shall promptly certify and file in such court the record upon which the penalty was imposed. The findings of the Secretary shall be set aside only if found to be unsupported by substantial evidence as provided by section 706(2)(E) of title 5, United States Code. Any final decision, order, or judgment of such District Court concerning such review shall be subject to appeal as provided in chapter 83 of title 28.

(d) Failure to pay assessment; maintenance of action

If any person fails to pay an assessment after it has become a final and unappealable order, or after the court has entered final judgment in favor of the agency, the Secretary shall refer the matter to the Attorney General, who shall recover the amount assessed by action in the appropriate United States district court. In such action the validity and appropriateness of the final order imposing the penalty shall not be subject to review.

(e) Payment of penalties into Treasury of United States

All penalties collected under authority of this section shall be paid into the Treasury of the United States.

29 U.S.C. § 1854 (1985). Private right of action

(a) Maintenance of civil action in district court by aggrieved person

Any person aggrieved by a violation of this chapter or any regulation under this Act by a farm labor contractor, agricultural employer, agricultural association, or other person may file suit in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy and without regard to the citizenship of the parties and without regard to exhaustion of any alternative administrative remedies provided herein.

(b) Appointment of attorney and commencement of action

Upon application by a complainant and in such circumstances as the court may deem just, the court may appoint an attorney for such complainant and may authorize the commencement of the action.

(c) Award of damages or other equitable relief; amount; criteria; appeal

(1) If the court finds that the respondent has intentionally violated any provision of this Act or any regulation under this Act, it may award damages up to and including an amount equal to the amount of actual damages, or statutory damages of up to $500 per plaintiff per violation, or other equitable relief, except that (A) multiple infractions of a single provision of this Act or of regulations under this Act shall constitute only one violation for purposes of determining the amount of statutory damages due a plaintiff; and (B) if such complaint is certified as a class action, the court shall award no more than the lesser of up to $500 per plaintiff per violation, or up to $500,000 or other equitable relief.

(2) In determining the amount of damages to be awarded under paragraph (1), the court is authorized to consider whether an attempt was made to resolve the issues in dispute before the resort to litigation.

(3) Any civil action brought under this section shall be subject to appeal as provided in chapter 83 of title 28.

29 U.S.C. 1855 (1985). Discrimination prohibited

(a) Prohibited activities

No person shall intimidate, threaten, restrain, coerce, blacklist, discharge, or in any manner discriminate against any migrant or seasonal agricultural worker because such worker has, with just cause, filed any complaint or instituted, or caused to be instituted, any proceeding under or related to this Act, or has testified or is about to testify in any such proceedings, or because of the exercise, with just cause, by such

worker on behalf of himself or others of any right or protection afforded by this Act.

(b) Proceedings for redress of violations

A migrant or seasonal agricultural worker who believes, with just cause, that he has been discriminated against by any person in violation of this section may, within 180 days after such violation occurs, file a complaint with the Secretary alleging such discrimination. Upon receipt of such complaint, the Secretary shall cause such investigation to be made as he deems appropriate. If upon such investigation, the Secretary determines that the provisions of this section have been violated, the Secretary shall bring an action in any appropriate United States district court against such person. In any such action the United States district courts shall have jurisdiction, for cause shown, to restrain violation of subsection (a) and order all appropriate relief, including rehiring or reinstatement of the worker, with back pay, or damages.

29 U.S.C. § 1856 (1985). Waiver of rights

Agreements by employees purporting to waive or to modify their rights under this Act shall be void as contrary to public policy, except that a waiver or modification of rights in favor of the Secretary shall be valid for purposes of enforcement of this chapter.

29 U.S.C. § 1861 (1985). Rules and regulations

The Secretary may issue such rules and regulations as are necessary to carry out this Act, consistent with the requirements of chapter 5 of title 5.

29 U.S.C. § 1862 (1985). Authority to obtain information

(a) Investigation and inspection authority concerning places, records, etc.

To carry out this Act the Secretary, either pursuant to a complaint or otherwise, shall, as may be appropriate, investigate, and in connection therewith, enter and inspect such places (including housing and vehicles) and such records (and make transcriptions thereof), question such persons and gather such information to determine compliance with this Act, or regulations prescribed under this Act.

(b) Attendance and testimony of witnesses, and production of evidence; subpoena authority

The Secretary may issue subpenas requiring the attendance and testimony of witnesses or the production of any evidence in connection with such investigations. The Secretary may administer oaths, examine witnesses, and receive evidence. For the purpose of any hearing or investigation provided for in this Act, the authority contained in sections 9 and 10 of the Federal Trade Commission Act (15 U.S.C. 49, 50), relating to the attendance of witnesses and the production of books, papers, and documents, shall be available to the Secretary. The Secretary shall conduct investigations in a manner which protects the confidentiality of any complainant or other party who provides information to the Secretary in good faith.

(c) Prohibited activities

It shall be a violation of this Act for any person to unlawfully resist, oppose, impede, intimidate, or interfere with any official of the Department of Labor assigned to perform an investigation, inspection or law enforcement function pursuant to this Act during the performance of such duties.

29 U.S.C. § 1863 (1985). Agreements with Federal and State agencies

(a) Scope of agreements

The Secretary may enter into agreements with Federal and State agencies (1) to use their facilities and services, (2) to delegate, subject to subsection (b), to Federal and State agencies such authority, other than rulemaking, as may be useful in carrying out this Act, and (3) to allocate or transfer funds to, or otherwise pay or reimburse, such agencies for expenses incurred pursuant to agreements under clause (1) or (2) of this section.

(b) Delegations of authority pursuant to written State plan

Any delegation to a State agency pursuant to subsection (a)(2) shall be made only pursuant to a written State plan which—

(1) shall include a description of the functions to be performed, the methods of performing such functions, and the resources to be devoted to the performance of such functions; and

(2) provides assurances satisfactory to the Secretary that the State agency will comply with its description under paragraph (1) and that the State agency's performance of functions so delegated will be at least comparable to the performance of such functions by the Department of Labor.

29 U.S.C. §1871 (1985). State laws and regulations

This chapter is intended to supplement State law, and compliance with this chapter shall not excuse

any person from compliance with appropriate State law and regulation.

29 U.S.C. §1872 (1985). Transition provision

The Secretary may deny a certificate of registration to any farm labor contractor, as defined in this Act, who has a judgment outstanding against him under the Farm Labor Contractor Registration Act of 1963 (7 U.S.C. 2041 et seq.), or is subject to a final order of the Secretary under that Act assessing a civil money penalty which has not been paid. Any findings under the Farm Labor Contractor Registration Act of 1963 may also be applicable to determinations of willful and knowing violations under this chapter.

Immigration Reform and Control Act of 1986 (IRCA), Pub. L. No. 99-603, 100 Stat. 3359.

Sec. 101. Control of unlawful employment of aliens.

* * * *

(b) CONFORMING AMENDMENTS TO MIGRANT AND SEASONAL AGRICULTURAL WORKER PROTECTION ACT.—(1) The Migrant and Seasonal Agricultural Worker Protection Act "29 USC 1801 note" (Public Law 97-470) is amended—

(A) by striking out "101(a)(15)(H)(ii)" in paragraphs (8)(B) and (10)(B) of section 3 (29 U.S.C. 1802) and inserting in lieu thereof "101(a)(15)(H)(ii)(a)";

(B) in section 103(a) (29 U.S.C. 1813(a))—

(i) by striking out "or" at the end of paragraph (4),

(ii) by striking out the period at the end of paragraph (5) and inserting in lieu thereof "; or", and

(iii) by adding at the end the following new paragraph:

"(6) has been found to have violated paragraph (1) or (2) of section 274A(a) of the Immigration and Nationality Act.";

(C) by striking out section 106 (29 U.S.C. 1816) and the corresponding item in the table of contents; and

(D) by striking out "section 106" in section 501(b) (29 U.S.C. 1851(b)) and by inserting in lieu thereof "paragraph (1) or (2) of section 274(A)(a) of the Immigration and Nationality Act".

(2) The amendments made by paragraph (1) shall apply to the employment, recruitment, referral, or utilization of the services of an individual occurring on or after the first day of the seventh month beginning after the date of the enactment of this Act.

* * * *

2010 Ariz. Sess. Laws ch. 113, § 7, amending Ariz. Rev. Stat. § 23.212 by adding:

K. It is an affirmative defense to a violation of subsection A of this section that the employer was entrapped. To claim entrapment, the employer must admit by the employer's testimony or other evidence the substantial elements of the violation. An employer who asserts an entrapment defense has the burden of proving the following by a preponderance of the evidence:

1. The idea of committing the violation started with law enforcement officers or their agents rather than with the employer.

2. The law enforcement officers or their agents urged and induced the employer to commit the violation.

3. The employer was not predisposed to commit the violation before the law enforcement officers or their agents urged and induced the employer to commit the violation.

L. An employer does not establish entrapment if the employer was predisposed to violate subsection A of this section and the law enforcement officers or their agents merely provided the employer with an opportunity to commit the violation. It is not entrapment for law enforcement officers or their agents merely to use a ruse or to conceal their identity. The conduct of law enforcement officers and their agents may be considered in determining if an employer has proven entrapment.

2010 Ariz. Sess. Laws ch. 113, § 8, amending Ariz. Rev. Stat. § 23.212.01 by adding:

K. It is an affirmative defense to a violation of subsection A of this section that the employer was entrapped. To claim entrapment, the employer must admit by the employer's testimony or other evidence the substantial elements of the violation. An employer who asserts an entrapment defense has the burden of proving the following by a preponderance of the evidence:

1. The idea of committing the violation started with law enforcement officers or their agents rather than with the employer.

2. The law enforcement officers or their agents urged and induced the employer to commit the violation.

3. The employer was not predisposed to commit the violation before the law enforcement officers or their agents urged and induced the employer to commit the violation.

L. An employer does not establish entrapment if the employer was predisposed to violate subsection A of this section and the law enforcement officers or their agents merely provided the employer with an opportunity to commit the violation. It is not entrapment for law enforcement officers or their agents merely to use a ruse or to conceal their identity. The conduct of law enforcement officers and their agents may be considered in determining if an employer has proven entrapment.

2010 Ariz. Sess. Laws ch. 113, § 9, amending Ariz. Rev. Stat. § 23.214(A) by adding [in brackets]:

A. After December 31, 2007, every employer, after hiring an employee, shall verify the employment eligibility of the employee through the e-verify program [and shall keep a record of the verification for the duration of the employee's employment or at least three years, whichever is longer].

RESPONDENT'S BRIEF

Supreme Court, U.S.
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In The Supreme Court of the United States

CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA, *et al.*,

Petitioners,

vs.

MICHAEL B. WHITING, *et al.*,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

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QUESTIONS PRESENTED

1. Whether federal law expressly preempts Arizona's law authorizing sanctions against licenses of employers that knowingly or intentionally employ unauthorized aliens when 8 U.S.C. § 1324a(h)(2) specifically preserves state sanctions "through licensing and similar laws."

2. Whether Arizona's law authorizing licensing sanctions against an employer is impliedly preempted by federal law even though the sanctions are within the savings clause in 8 U.S.C. § 1324a(h)(2) and Arizona's law is otherwise consistent with IRCA.

3. Whether Arizona's statute requiring employers within the State to use the federal E-Verify program to confirm that new employees are legally authorized to work in this country is impliedly preempted because Congress has not mandated the use of this federal program nationally.

PARTIES TO THE PROCEEDING

Petitioners, who were plaintiffs/appellants below, are accurately listed in Petitioners' brief. Due to changes in state and county officers and pursuant to Rule 35.3 of the Supreme Court Rules, Respondents, who were defendants/appellees below, are now Michael B. Whiting; Kenny Angle; Melvin R. Bowers Jr.; Sam Vederman; Brad Carlyon; Daisy Flores; William Mundell; Gale Garriott; Terry Goddard; David Rozema; Barbara Lawall; Janice K. Brewer; Sheila Polk; Derek D. Rapier; Ed Rheinheimer; George Silva; Jon Smith; Matthew J. Smith; Richard M. Romley; and James P. Walsh.

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Basic Pilot Program Extension and Expansion Act of 2003, Pub. L. No. 108-156, 117 Stat. 1944 8

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Immigration Reform and Control Act of 1986, Pub. L. No. 99-603, 100 Stat. 3359

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Bruno, Cong. Research Serv., *RL 33973, Unauthorized Employment in the United States: Issues and Options* (2007) 11

Department of Homeland Security Appropriations for 2009, Hearing Before the H. Subcomm. on Homeland Sec. of the H. Comm. on Appropriations, 110th Cong. 300 (2008) 61

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Electronic Employment Verification Systems: Needed Safeguards to Protect Privacy and Prevent Misuse, Hearing Before the Subcomm. on Immigr., Citizenship, Refugees, Border Sec., and Int'l Law of the H. Comm. of the Judiciary, 110th Cong. 52 (2008) 62

Immigration Enforcement at the Workplace: Learning from the Mistakes of 1986: Hearing Before the Subcomm. on Immigr., Border Sec., and Citizenship of the S. Comm. on the Judiciary, 109th Cong. 13 (2006) (statement of Richard M. Stana, Dir. of Homeland Sec. & Justice, U.S. Gov. Accountability Office).....52

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U.S. Citizenship & Immigration Servs., *E-Verify Memorandum of Understanding for Employers* (2009).....9, 10

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U.S. Citizenship & Immigration Servs., *E-Verify User Manual for Employers* (Sept. 2010).....9, 10

U.S. Gen. Accounting Office, *GAO/GDD 90-62, Immigration Reform: Employer Sanctions and the Question of Discrimination* (1990).....6

U.S. Gen. Accounting Office, *PAD 80-22, Illegal Aliens: Estimating Their Impact on the United States* (1980).....3

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Westat, *Findings of the Web Basic Pilot Evaluation* (2007).....11, 60

Westat, *Findings of the E-Verify Program Evaluation* (2009).....8, 11, 61

INTRODUCTION

The Legal Arizona Workers Act (the "Act") simply attempts to ensure that workers who are hired by Arizona employers are legally authorized to work in this country. This Court recognized more than thirty years ago in *DeCanas v. Bica*, 424 U.S. 351, 357 (1976), that such legislation is "within the mainstream of [State] police power" and acknowledged that an unlawful work force can significantly impact wages and working conditions for all workers. Arizona's law addresses these problems by (1) providing that the State licenses of employers that knowingly or intentionally employ unauthorized aliens may be suspended or revoked, and (2) requiring all employers to use the federal E-Verify program to confirm that the people they hire are legally authorized workers.

Arizona's employer sanction scheme does not conflict with federal law. When Congress enacted federal employer sanctions in 1986 as part of the Immigration Reform and Control Act ("IRCA"), Pub. L. No. 99-603, 100 Stat. 3359, it specifically preserved State authority to impose sanctions through licensing and similar laws. Arizona's law is crafted to fall within that savings clause and is modeled after IRCA to ensure that it is otherwise consistent with federal requirements. The employer sanctions law imposes no new obligation on employers, but merely authorizes the suspension or revocation of State-issued business licenses of employers that knowingly or intentionally employ unauthorized aliens – conduct that has been illegal in this country since IRCA's enactment in

1986. Because Arizona's law falls within IRCA's savings clause and is otherwise consistent with federal law, it is not preempted.

Federal law also does not preclude Arizona from requiring employers in that State to use the federal E-Verify program. Although Congress has not made the program's use mandatory on a nationwide basis, federal law does not prohibit a State from making its use mandatory for employers within its boundaries. Congress developed E-Verify to have a more effective employee verification system than the I-9 process that was created when Congress enacted IRCA in 1986. Requiring employers within Arizona to use E-Verify in a manner consistent with the program's purpose does not conflict with federal law. Rather, it furthers the interest of both the State and the federal governments in having an effective employee verification system and a lawful work force in this country.

The Ninth Circuit correctly concluded that federal law does not preempt Arizona's licensing sanctions and E-Verify requirement, and this Court should affirm that decision.

STATEMENT

I. FEDERAL EMPLOYER SANCTIONS AND VERIFICATION REQUIREMENTS.

Until Congress enacted IRCA, federal immigration law did not prohibit employers from hiring unauthorized aliens. *See DeCanas v. Bica*, 424 U.S. at 360 (noting that immigration law showed at best "a peripheral concern with employment of illegal entrants"). In contrast, various States had laws prohibiting the employment of unauthorized aliens within their borders. *See* U.S. Gen. Accounting Office, *PAD 80-22, Illegal Aliens: Estimating Their Impact on the United States*, 46, tbl. 12 (1980).

In its 1976 *DeCanas* decision, this Court recognized that regulating the employment of unauthorized aliens came within the States' traditional police power and that federal law had not displaced this authority. *DeCanas*, 424 U.S. at 357. The Court observed that "[S]tates possess broad authority under their police powers to regulate the employment relationship to protect workers within the state," and that regulating the employment of unauthorized aliens fell within that power. *Id.* at 356. Ten years after *DeCanas* affirmed the States' police power to sanction those who employ unauthorized aliens within State borders, Congress enacted IRCA, which made significant changes to the nation's immigration laws and included the first federal law penalizing employers who hire unauthorized aliens. IRCA § 101 (codified as 8 U.S.C. § 1324a).

A. IRCA's Employer Sanctions.

Under IRCA, employers cannot hire, recruit or refer for a fee "for employment in the United States an alien knowing the alien is an unauthorized alien."[1] 8 U.S.C. § 1324a(a)(1)(A). IRCA's employer sanctions provision created a federal administrative hearing process to determine violations and impose civil penalties, which consist mainly of monetary fines. 8 U.S.C. § 1324a(e)(4). IRCA also established criminal penalties for employers who have a pattern or practice of unlawfully employing unauthorized aliens. 8 U.S.C. § 1324a(f)(1). Congress specifically addressed State laws concerning employer sanctions by providing that, "[t]he provisions of this section preempt any State or local law imposing civil or criminal sanctions (other than through licensing and similar laws) upon those who employ, or recruit or refer for a fee for employment, unauthorized aliens." 8 U.S.C. § 1324a(h)(2).

Congress intended employer sanctions to reduce illegal immigration. "Employers will be deterred by the penalties in this legislation from hiring unauthorized aliens and this, in turn, will deter aliens from entering illegally or violating their status in search of

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[1] IRCA defines an "unauthorized alien" as an alien who at the time of employment is not "either (A) an alien lawfully admitted for permanent residence, or (B) authorized to be so employed by this chapter or by the Attorney General." 8 U.S.C. § 1324a(h)(3).

employment." H.R. Rep. No. 99-682(I), at 46 (1986), *reprinted in* U.S.C.C.A.N. 5641, 5650.

B. The I-9 Document Verification Process.

IRCA also created a document-based verification process (called the "I-9" process after the required verification form) in which the employer examines certain identification documents specified by law and then attests to examining them on the I-9 document. 8 U.S.C. § 1324a(b)(1). The employer is not required to determine whether the identification documents are genuine, but may rely on a document if it "reasonably appears on its face to be genuine." 8 U.S.C. § 1324a(b)(1)(A)(iii). The employee must also sign the I-9 form attesting that he or she is either a United States citizen or national or is otherwise authorized to work in the United States. 8 U.S.C. § 1324a(b)(2). The employer must then retain the verification form for a specified amount of time and make it available for inspection by various federal agencies. 8 U.S.C. § 1324a(b)(3). This verification process was an important component of the employer sanctions program: "[A]n effective verification procedure, combined with an affirmative defense for those who in good faith follow the procedure, is essential. Otherwise, the system cannot both be effective and avoid discrimination." H.R. Rep. No. 99-682(I) at 60.

C. The I-9 Process's Shortcomings and Immigration Reform.

In the decade after IRCA's enactment, it became clear that document fraud had undermined the I-9 process. As early as 1990, the General Accounting Office observed that "[w]holly apart from their impact on discrimination, the prevalence of counterfeit and fraudulently obtained documents threatens the security of the IRCA's verification system for prohibiting unauthorized alien employment." U.S. Gen. Accounting Office, *GAO/GDD 90-62, Immigration Reform: Employer Sanctions and the Question of Discrimination* 76 (1990). In 1996, a House committee reported that IRCA's employer verification system and sanctions were "riddled with document fraud, and ineffective in deterring both the hiring of illegal aliens and the illegal entry of aliens seeking employment. . . ." H.R. Rep. No. 104-469(I), at 119 (1996); *see also* S. Rep. No. 104-249, at 4 (1996) (observing that "as was feared – there is widespread fraud in [the I-9 process's] use"); *see also* 143 Cong. Rec. E55 (Extension of Remarks, daily ed. Jan. 7, 1997) (statement of Rep. McCollum) ("The primary reason employer sanctions are not working today is the rampant fraud in the documents to prove eligibility to work, specifically the Social Security card.")

And the number of undocumented immigrants was rising. In 1986, an estimated 3.2 million unauthorized aliens lived in the United States. Ruth Ellen Wasem, Cong. Research Serv., *RL 33874, Unauthorized Aliens Residing in the United States: Estimates*

Since 1986 at 3 (2009). Although the number dropped to 1.9 million following IRCA's enactment, it rose again to 5.8 million in 1996, nearly doubling the pre-IRCA number. *Id.*

As a result of these concerns, Congress again addressed immigration-related issues in 1996. Landmark welfare reform legislation, the Personal Responsibility and Work Opportunity Reconciliation Act of 1996, significantly limited access to public benefits based on immigration status. Pub. L. No. 104-193, §§ 401, 402, 411-412, 110 Stat. 2105, 2261-2265, 2268-2270 (1996). Congress also mandated increased State and federal cooperation regarding immigration enforcement. Two new statutes, 8 U.S.C. §§ 1644 and 1373, required State and federal officials to exchange information about immigration status.

Congress also began the process of improving the employer verification system in 1996 by approving three pilot programs as part of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 ("IIRIRA"). Pub. L. No. 104-208, Div. C, § 401, 110 Stat. 3009-546, 655. Congress mandated that four goals guide the pilot program's development and operation: (1) ensuring maximum reliability and ease of use for employers while protecting the underlying information's privacy and security; (2) responding to all inquiries concerning an employee's work authorization from employers participating in the pilot program; (3) preventing any unauthorized disclosure of personal information; and (4) ensuring that the verification system did not cause unlawful discriminatory

practices based on national origin or citizenship. IIRIRA, § 404(d). Of the three pilot programs authorized by that law, only the Basic Pilot program (now called "E-Verify") remains in operation today. Westat, *Findings of the E-Verify Program Evaluation* (2009) ("2009 Westat Report").

D. The Development of E-Verify.

The history of E-Verify has been one of continuous improvement and expansion. When authorized in 1996, the Basic Pilot program was available in five of the seven States that had the highest populations of unauthorized aliens. IIRIRA, § 401(c)(1). Congress initially authorized the program for only four years (IIRIRA, § 401(b)), but it has consistently extended the program's life.[2] It expanded the program in 2003, making it available in all fifty States. Basic Pilot Program Extension and Expansion Act of 2003, Pub. L. No. 108-156, 117 Stat. 1944 (2003). In 2008, the federal government began requiring any entity that maintained or applied for federal contracts to use E-Verify. 48 C.F.R. § 22.1800-1802 (2009). And beginning in 2006, States began requiring employers to use E-Verify.[3] In response to these changes, U.S.

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[2] Department of Homeland Security Appropriations Act, Pub. L. No. 111-83, § 547, 123 Stat. 2177 (extending E-Verify to Sept. 30, 2012).

[3] 2007 Ariz. Sess. Laws ch. 279; 2006 Colo. Sess. Laws ch. 340; 2006 Ga. Laws 457; 2008 Miss. Laws ch. 312; 2008 Mo. Laws 85; 2009 Neb. Laws L.B. 403; 2007 N.C. Sess. Laws 259,

(Continued on following page)

Citizenship and Immigration Services' (USCIS) website directs employers to consult State law to determine if their State requires them to use E-Verify. *I am an Employer, How do I . . . use E-Verify* at 1 (2008). USCIS also contracted with the University of Arizona's Center of Excellence for Border Security and Immigra-tion and the Federal Consulting Group "to examine the E-Verify program in a mandatory environment (Arizona)." *Westat Evaluation of the E-Verify Program: USCIS Synopsis of Key Findings and Program Implications* 2 (2010) ("USCIS Synopsis").

E-Verify allows employers to ensure that they are hiring authorized workers by electronically comparing the identification and authorization information that employees provide with information contained in federal Social Security Administration ("SSA") and Department of Homeland Security ("DHS") databases. To participate in E-Verify, the employer must sign a memorandum of understanding that governs the system's operation. U.S. Citizenship & Immigration Servs., *E-Verify User Manual for Employers* (Sept. 2010) ("User Manual"); U.S. Citizenship & Immigration Servs., *E-Verify Memorandum of Understanding for Employers* (2009) ("MOU"). After enrolling in E-Verify, employers must still complete the I-9 verification process, but they also submit the verification form information through a secure internet

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§ 23.1(a); 2007 Okla. Sess. Laws ch. 112; 2008 S.C. Acts 280; 2010 Utah Laws ch. 403; Idaho Exec. Order 2009-10; Minn. Exec. Order 08-01; R.I. Exec. Order 08-01.

connection to be compared with the SSA and DHS databases. User Manual at 13-16.

If the information that the employer submits matches the records in the federal databases, E-Verify immediately notifies the employer that the individual is employment authorized. If the information that the employee has provided does not match the information in the federal databases, E-Verify issues a tentative nonconfirmation. MOU Art. III. Before issuing a tentative nonconfirmation, however, E-Verify will ask the employer to confirm that the information submitted is accurate to avoid inaccurate results based on typographical errors. User Manual at 17. If a tentative nonconfirmation is issued, the employee is notified and given an opportunity to contact SSA or DHS to resolve any potential problem. *Id.* at 27-30 (SSA), 35-38 (DHS). Until there is a final determination, the employer may not terminate the employee for being unauthorized. IIRIRA, § 403(a)(4)(B)(iii). Upon receipt of a final nonconfirmation, an employer may terminate the employee. IIRIRA, § 403(a)(4)(C)(i). An employer who chooses not to terminate the employee must inform DHS and is subject to a rebuttable presumption of having knowingly hired an unauthorized alien. IIRIRA, § 403(a)(4)(C)(i)-(iii).

E-Verify has been the subject of a number of independent evaluations.[4] Most recently, a 2009 independent evaluation concluded that E-Verify was 95.9% accurate in its initial determination regarding employment authorization. USCIS Synopsis at 4; 2009 Westat Report at 116. E-Verify participants reported minimal costs to participate and were generally satisfied with the program. 2009 Westat Report at 169. USCIS has called E-Verify "the best available tool to help employers determine whether their employees are authorized to work in the United States." USCIS Synopsis at 1.

II. THE LEGAL ARIZONA WORKERS ACT.

Over the years, the nation's unauthorized alien population has continued to increase. By 2005, there were approximately 7.2 million unauthorized workers in the United States, representing about five percent of the labor force. Andorra Bruno, Cong. Research Serv., *RL 33973, Unauthorized Employment in the United States: Issues and Options* 1 (April 20, 2007). And by 2007, the number of unauthorized aliens reached an estimated 11.8 to 12.5 million people. Wasem at 3. According to the district court, unauthorized aliens in Arizona's work force "dr[ove] down wages for competing authorized workers." Add19.

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[4] 2009 Westat Report; Westat, *Findings of the Web Basic Pilot Evaluation* (2007) ("2007 Westat Report"); Temple University Institute for Survey Research and Westat, *Findings of the Basic Pilot Program Evaluation* (2002).

In response, on July 2, 2007, Arizona's Governor signed into law the Legal Arizona Workers Act ("the Act"). (Joint Appendix ["JA"] 402-04.) The Act authorized sanctions against the licenses of Arizona employers who knowingly or intentionally employed unauthorized aliens, A.R.S. §§ 23-212, -212.01,[5] and required Arizona employers to use E-Verify, A.R.S. § 23-214. 2007 Ariz. Sess. Laws ch. 279, § 2. Implementation of employer sanctions and the E-Verify requirement began January 1, 2008. A.R.S. §§ 23-212(D), -212.01(D) (limiting sanctions to conduct occurring after January 1, 2008); -214(A) (requiring E-Verify use as of January 1, 2008).

As the Legislature required, before October 1, 2007, the Arizona Department of Revenue mailed notice to employers of the new E-Verify requirement and employer sanctions. 2007 Ariz. Sess. Laws ch. 279, § 3. JA 404-08. Beginning January 1, 2008,

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[5] As originally enacted, the Act contained sanction provisions in a single provision (A.R.S. § 23-212). 2007 Ariz. Sess. Laws ch. 279, § 2. In 2008, the Legislature enacted legislation that amended the Act in several ways. 2008 Ariz. Sess. Laws ch. 152. This legislation separated knowing violations and intentional violations into separate provisions (A.R.S. §§ 23-212, -212.01); provided that businesses would forfeit government economic development incentives if they did not use E-Verify (A.R.S. § 23-214(B)); and created a new voluntary employer compliance program (A.R.S. § 23-215). *Id.* The Legislature further amended the sanction statute in 2010 to add an affirmative defense for entrapment (A.R.S. §§ 23-212(K), -212.01(K)) and to add a record-retention requirement for employee verifications (A.R.S. § 23-214). 2010 Ariz. Sess. Laws ch. 113, §§ 7-9.

Arizona's Attorney General and county attorneys began investigating any complaints that they received concerning the employment of unauthorized aliens.

A. The Sanction Statute.

The Act's employer sanctions provision was drafted to ensure consistency with federal law. For example, the Act:

- incorporates the IRCA definition of "unauthorized alien," A.R.S. § 23-211(11);
- requires that the phrase "knowingly employ an unauthorized alien" "be interpreted consistently with 8 [U.S.C.] § 1324a and any applicable federal rules and regulations," A.R.S. § 23-211(8);
- authorizes sanctions only against employer licenses so that the sanctions are within IRCA's savings clause that preserved State authority to impose sanctions "through licensing and similar laws," A.R.S. § 23-212(F), -212.01(F); 8 U.S.C. § 1324a(h)(2);
- incorporates the federal rebuttal presumption that the employer did not knowingly or intentionally employ an unauthorized alien if the employer verified the employee's employment authorization through the federal E-Verify program, A.R.S. §§ 23-212(I), -212.01(I); IIRIRA, § 402(b), Pub. L. No. 104-208, Div. C., 110 Stat. 3009-546, 656-57;

- replicates the federal affirmative defense for employer sanctions if the employer "complied in good faith" with the I-9 system, A.R.S. §§ 23-212(J), -212.01(J); 8 U.S.C. § 1324a(a)(3).

It also establishes requirements for processing complaints. The Arizona's Attorney General and county attorneys may investigate complaints that an employer has knowingly or intentionally employed an unauthorized alien. A.R.S. §§ 23-212(B), -212.01(B). It prohibits authorities from investigating complaints based "solely on race, color or national origin." *Id.* In investigating and prosecuting complaints under the sanction statutes, State officials must rely on information obtained from the federal government pursuant to 8 U.S.C. § 1373(c) to establish the employee's immigration status. A.R.S. §§ 23-212(B), (H); -212.01(B), (H). Although the Attorney General has joint investigative authority, only county attorneys may bring enforcement actions under the sanction statute. A.R.S. §§ 23-212(D), -212.01(D). If an investigation shows that a complaint is not frivolous, the investigating official must notify federal immigration authorities and the local law enforcement agency of the unauthorized alien, and in the case of a complaint filed with the Attorney General, must notify the appropriate county attorney. A.R.S. §§ 23-212(C), -212.01(C).

A county attorney must file an action in State court to impose sanctions against an employer. A.R.S. §§ 23-212(F), -212.01(F). These actions are governed generally by the Arizona Rules of Civil Procedure and

specifically by Rule 65.2, which the Arizona Supreme Court adopted to address the requirements of the sanction statutes. These rules require that the complaint identify the licenses at issue and specify the "facts alleged to show that one or more employees are unauthorized aliens" and the "facts alleged to show that the employer intentionally or knowingly employed one or more unauthorized aliens." Ariz. R. Civ. P. 65.2(B).

The Act defines "license" as "any agency permit, certificate, approval, registration, charter or similar form of authorization that is required by law and that is issued by any agency for the purposes of operating a business in this state." A.R.S. § 23-211(9)(a). It includes in the definition articles of incorporation, certificates of partnership, foreign corporation registrations, and transaction privilege (sales tax) licenses, but excludes from it licenses issued under title 45 (governing water), title 49 (governing the environment), and any professional license. A.R.S. § 23-211(9)(b), (c). Employers found to have violated the sanction statutes have the same appeal rights and other procedural protections that exist for other civil actions. A.R.S. § 12-2101(B).

Arizona's sanction statute creates a tiered system of licensing penalties for adjudicated violations. For a first knowing violation, the court may, in its discretion, suspend the business licenses for up to ten days after considering various factors, such as the number of unauthorized aliens employed, the duration of the violation, prior misconduct, and the degree of harm

resulting from the violation. A.R.S. § 23-212(F)(1)(d). A first knowing violation also requires a three-year probationary term during which the employer must file quarterly reports for all new hires. A.R.S. § 23-212(F)(1)(b). A first intentional violation results in the mandatory suspension of an employer's business licenses for a minimum of ten days and a probationary period of five years. A.R.S. § 23-212.01(F)(1)(b), (c). In addition, for any first violation, the employer is required to terminate the employment of all unauthorized aliens and file an affidavit indicating that the employer has taken this action within three days of the court's order. A.R.S. §§ 23-212(F)(1)(a); -212.01(F)(1)(a). If the employer does not file the affidavit with the court in three days, the employer's licenses are suspended until the affidavit is filed. *Id.* For a second knowing or intentional violation during the probation period, business licenses are permanently revoked. A.R.S. §§ 23-212(F)(2); -212.01(F)(2).[6]

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[6] As of this date, only three enforcement actions have been filed against Arizona employers under the Act. *See State of Arizona v. Waterworld Ltd. P'ship*, No. CV2009-038848 (Maricopa Cnty. Super. Ct. filed Dec. 21, 2009) (resolved by consent judgment); *State of Arizona v. Danny's Subway Inc.*, No. CV2010-005886 (Maricopa Cnty. Super. Ct. filed March 9, 2010) (resolved by consent decree); *State of Arizona v. Scottsdale Art Factory, LLC*, No. CV2009-036359 (Maricopa Cnty. Super. Ct. filed Nov. 18, 2009) (pending).

B. The E-Verify Requirement.

To help prevent the employment of unauthorized aliens, Arizona also requires employers to use the federal government's E-Verify program to confirm that newly hired employees are authorized to work in this country. A.R.S. § 23-214(A). Initially, the only consequence for failing to verify the employment authorization status of new hires through E-Verify was the loss of the rebuttable presumption set forth in A.R.S. § 23-212(I). In 2008, the Legislature amended the verification statute so that a business must participate in E-Verify to receive economic development incentives from government entities. A.R.S. § 23-214(B). An employer applying for an economic development incentive must provide proof to the government entity that it has enrolled and is participating in E-Verify. *Id.* If the government entity determines that an employer failed to participate in E-Verify after receiving an economic development incentive, the employer may be required to repay all the monies that it has received. *Id.* An "economic development incentive" includes "any grant, loan or performance-based incentive from any government entity that is awarded after September 30, 2008," but it does not include "any tax provision under title 42 or 43." A.R.S. § 23-214(B)(1). The names of Arizona's employers participating in E-Verify are available on the Arizona Attorney General's Office website, and that list is updated quarterly. A.R.S. § 23-214(C).

III. PROCEEDINGS BELOW.

On August 29, 2007, the Petitioners filed the first of two consolidated actions challenging the Act in the District of Arizona. JA 223-66; 267-85. After the district court dismissed the first cases based on lack of jurisdiction because the State defendants lacked authority to enforce the Act, Pet. App. 126a, the Petitioners re-filed their complaints adding the county attorneys as defendants and asserting the same legal challenges. JA 291-344; 345-66.

On February 7, 2008, the district court entered judgment in Respondents' favor. Pet. App. 94a. It found that IRCA did not expressly preempt the sanction statute. "The Act's definition of license does not depart from common sense or traditional understandings of what is a license. . . . It therefore falls within the plain meaning of IRCA's savings clause" preserving State authority to impose sanctions through licensing and similar laws. Pet. App. 62a. The district court also found that the State could impose sanctions without a prior federal adjudication because IRCA's plain language contained no such restriction. Pet. App. 64a. It further disagreed with Petitioners' narrow interpretation of the savings clause, noting that "Congress passed employer sanctions provisions that expressly preempt only some state powers and expressly preserve other state powers. It allowed complementary enforcement by States through 'licensing and similar laws.'" Pet. App. 73a. It also found that the sanction statute did not conflict with Congress's purposes and objectives because it did not

impose stricter standards of conduct than federal law did or undermine the federal adjudication system. Pet. App. 78a-80a.

The district court also found that the verification statute did not conflict with federal law. It noted that IIRIRA prohibited only the Attorney General (now the Secretary of DHS) from requiring the use of E-Verify and that without more, this prohibition does not "raise an inference that Congress intended to prevent the states from mandating use of the system in their licensing laws." Pet. App. 83a. The district court also concluded that A.R.S. § 23-214's requirement of using E-Verify did not create an obstacle to Congress's purposes and objectives because "[f]ederal policy encourages the utmost use of E-Verify" and the Act "effectively increases employer use of the system with no evidence of surpassing logistical limits." Pet. App. 85a.

On September 17, 2008, the Ninth Circuit issued a decision affirming the district court, Pet. App. 26a, which it then amended on March 9, 2009, Pet. App. 1a. Citing this Court's decision in *DeCanas*, the court concluded that regulating the employment of unauthorized aliens was within the States' historic police power and was therefore subject to a presumption against preemption absent clear preemptive intent by Congress. Pet. App. 15a-16a. The court then turned to Petitioners' two preemption claims.

The court first found that IRCA did not preempt the sanction statute because the Act's "broad definition of 'license' is in line with the terms traditionally used and falls within the savings clause." Pet. App. 17a. It did not find any support for Petitioners' contention that the savings clause encompassed "only licenses to engage in specific professions, such as medicine or law, and not licenses to conduct business." *Id.* And it disagreed with Petitioners' claim that a federal adjudication was a prerequisite to State sanctions because IRCA's legislative history clearly recognized the ability of a State to "condition an employer's 'fitness to do business' on hiring documented workers." Pet. App. 18a.

With regard to E-Verify, the court found that the verification statute did not conflict with federal law and agreed with the district court's conclusion that "while Congress made participation in E-Verify voluntary at the national level, that did not in and of itself indicate that Congress intended to prevent states from making participation mandatory." Pet. App. 20a. Congress did not expressly preempt State activity in the area of employee verification, although it demonstrated that it knew how to do so in enacting the preemption clause in IRCA's sanction provisions. *Id.* Finding no express preemption, the court examined whether the verification statute constituted an obstacle to accomplishing Congress's full purposes and objectives and decided that it did not: "Though Congress did not mandate E-Verify, Congress plainly envisioned and endorsed an increase in its usage.

The Act's requirement that employers participate in E-Verify is consistent with and furthers this purpose, and thus does not raise conflict-preemption concerns." Pet. App. 21a. The Petitioners requested rehearing en banc, which the court denied on March 9, 2009. JA 146, 166, 184, 202, 220.

SUMMARY OF ARGUMENT

1. Although the federal government is responsible for regulating immigration, there remains room for State legislation that touches on immigration issues. This is particularly true in the area of employment. As this Court recognized in *DeCanas*, "[S]tates possess broad authority under their police powers to regulate the employment relationship to protect workers within the State." 424 U.S. at 356. Employment of unauthorized aliens may deprive citizens and authorized noncitizens of jobs and depress wages and working conditions. *Id.* Because State laws addressing unauthorized workers are "within the mainstream of [State] police power," *id.*, federal law preempts those laws only if "the clear and manifest purpose of Congress would justify that conclusion." *Id.* at 357 (internal quotation marks omitted).

Congress recognized the need to preserve State authority to address unauthorized employment when it enacted IRCA in 1986. In IRCA, Congress approved the first federal sanctions against employers that hire

unauthorized aliens. Although it preempted State authority to impose civil and criminal sanctions against employers, it specifically preserved State authority to impose sanctions "through licensing and similar laws." 8 U.S.C. § 1324a(h)(2). This division of authority respects the State's traditional responsibility over State licenses but gives the federal government the exclusive authority to impose other types of sanctions against employers who hire unauthorized aliens.

Arizona's law authorizing the suspension and revocation of State licenses of an employer that has knowingly or intentionally employed unauthorized aliens fits easily within the savings clause that Congress enacted in IRCA. Arizona's law is also otherwise consistent with IRCA's requirements. It adopts the federal definition of unauthorized alien, A.R.S. § 23-211(11), relies on the federal scienter requirement, A.R.S. § 23-211(8), and incorporates defenses for the use of E-Verify and good faith compliance with the I-9 procedures that are in federal law, A.R.S. §§ 23-212(I), (J), -212.01(I), (J). It also requires that State officials rely on information from the federal government to establish whether a person is an unauthorized alien. A.R.S. § 23-212(B), (H), -212.01(B), (H).

Arizona's law includes measures to prevent abuses. Law enforcement officials are responsible for any investigations, and no complaint based on "race, color or national origin" may be investigated. A.R.S. §§ 23-212(B), -212.01(B). In addition, criminal penalties are

established for "false and frivolous" complaints. *Id.* Sanctions are imposed in civil proceedings in State court where the parties have the usual procedural protections and appeal rights.

The Court of Appeals correctly concluded that IRCA does not preempt Arizona's employer sanctions law. IRCA does not expressly preempt Arizona's sanctions law because it imposes sanctions that are within IRCA's savings clause for sanctions through "licensing and similar laws." 8 U.S.C. § 1324a(h)(2). Arizona's law defines license to include various forms of permission or authorization that are "required by law and that [are] issued by any agency for operating a business in this state." A.R.S. § 23-211(9). It specifically includes articles of incorporation, certificates of partnership, and authority for foreign entities to transact business in the State. *Id.* Each of them constitutes "a right or permission granted in accordance with law by a competent authority to engage in some business or occupation" – the definition of license accepted by all parties in this case.

Although Petitioners complain that Arizona's definition of license is too broad to fit within IRCA's savings clause, as the court of appeals correctly concluded, Arizona's law is consistent with the traditional definition of "license." Pet. App. 40a. Nor does Arizona's law fall outside the savings clause because it addresses the suspension and revocation of licenses but not the issuance of licenses. Sanctions through licensing laws logically includes the suspension and revocation of State licenses, and a State need not

address issuance and revocation in the same statute to fall within the savings clause.

Petitioners propose various restrictions on State authority to suspend and revoke State licenses, but none of them are supported by IRCA's text. The savings clause is not, for example, limited to specific types of licenses such as those for farm labor contractors. Nor does IRCA require a federal adjudication against an employer for IRCA violations before a State can take action against that employer's license.

The legislative history also does not support Petitioners' effort to restrict the plain language of IRCA's savings clause. They argue that a House Report supports requiring a prior federal adjudication as a prerequisite to State sanctions against a licensee. It says that IRCA does not intend to preempt State laws that "require [the] licensee . . . to refrain from hiring, recruiting or referring undocumented aliens." H.R. Rep. No. 99-682(I) at 58. It also refers to "lawful state or local processes," for the suspension or revocation of licenses. The Report does not support Petitioners' attempt to limit the reach of the savings clause. Even if the Report could be read to support Petitioners, principles of statutory construction preclude a House Report from altering the plain language that Congress enacted.

2. IRCA also does not preempt the sanctions statute under implied conflict preemption principles. Although IRCA established a federal enforcement

scheme, the existence of a federal enforcement scheme for federal sanctions does not preclude State enforcement actions for sanctions within the savings clause. To the contrary, imposing such a requirement undermines the savings clause by substantially restricting a State's ability to impose sanctions against its licensees when it deems appropriate. It also intrudes on State sovereignty by preventing a State enforcement against a State licensee unless the federal government has completed its own enforcement action against that entity. There is no evidence Congress intended such a significant limitation on State authority.

Arizona's law does not disrupt the balance that Congress struck when it enacted IRCA. The savings clause for sanctions through "licensing and similar laws" is part of the balance that Congress struck. Arizona's law also does not undermine IRCA's protections against discrimination. While Arizona did not include an anti-discrimination remedy, it does not undermine any of the protections available under State and federal law. It also does not create new burdens for employers that conflict with IRCA. Although Arizona provides significant penalties for knowingly or intentionally employing unauthorized aliens, they are sanctions that Congress preserved for the State through the savings clause.

3. Arizona's E-Verify requirement is also not preempted. Although E-Verify is not mandatory nationally, and Congress expressly prohibited the Secretary of the DHS from requiring its use, Congress

has not addressed whether States may require employers within their boundaries to use the program. Implied conflict preemption principles do not preclude a State E-Verify requirement. As an initial matter, it is not impossible to comply with both a State E-Verify requirement and federal law. An employer who uses E-Verify to comply with Arizona law would not be in violation of federal law.

Second, requiring E-Verify does not pose an obstacle to federal goals. Congress directed the development of this electronic verification system in direct response to the failures of the I-9 process. The Congressional objective was to develop a more effective verification system to help ensure that employers do not hire unauthorized workers. Requiring employers to use the program should advance these goals by increasing participation. As the United States amicus brief indicated, the increased workload does not burden the federal program, which can handle the additional workload from the State E-Verify requirements.

The consequences for an Arizona employer who does not participate in E-Verify are similar to the consequences under federal law. Arizona law provides no direct sanction, but the employer loses the benefit of a rebuttable presumption in an enforcement action, and the employer cannot receive government contracts or other economic incentives from governmental entities. This type of requirement does not create an obstacle to the federal goals of the E-Verify program.

For these reasons, the Court of Appeals decision correctly concluded that Arizona's employer sanctions law and E-Verify requirement are not preempted.

ARGUMENT

I. FEDERAL LAW DOES NOT PREEMPT ARIZONA'S EMPLOYER SANCTIONS LAW.

Although the "power to regulate immigration is unquestionably exclusively a federal power," State laws that touch on immigration issues are not per se preempted. *DeCanas*, 424 U.S. at 354. States may enact legislation that affects immigrants and immigration-related matters provided they comply with the relevant constitutional principles. *See, e.g., Plyler v. Doe*, 457 U.S. 202, 226 (1982) (recognizing that a State may "borrow" the federal classification concerning who is not legally in this country and analyzing the State's use of this classification under equal protection requirements); *DeCanas*, 424 U.S. at 355 (applying preemption analysis to determine constitutionality of California law prohibiting employment of unauthorized workers).

While delineating the parameters of State authority, this Court has recognized the important State interests that the problem of illegal immigration affects. In *DeCanas*, this Court acknowledged that State legislation concerning the employment of unauthorized aliens was in the "mainstream of [state] police power." 424 U.S. at 356. The Court recognized

that illegal immigration may "deprive[] citizens and legally admitted aliens of jobs . . . [and] depress wage scales and working conditions of citizens and legally admitted aliens" and acknowledged the States' interest in addressing "local problems" that may result from a work force that is not authorized to work in this country. *Id.* at 356-57. In *Plyler v. Doe,* this Court again acknowledged the State's interest in immigration-related legislation:

> [a]lthough the State has no direct interest in controlling entry into this country, that interest being one reserved by the Constitution to the Federal Government, unchecked unlawful migration might impair the State's economy generally, or the State's ability to provide some important service. Despite the exclusive federal control of this Nation's borders, we cannot conclude that the States are without power to deter the influx of persons entering the United States against federal law, and whose numbers might have a discernible impact on traditional state concerns. *See DeCanas v. Bica,* 424 U.S. at 354-56.

Plyler, 457 U.S. at 228 n.23.

Congress has also recognized the impact of unlawful immigration on States and the important role States play in addressing its consequences. For example, Congress has enacted legislation to reimburse States for the costs of incarcerating unlawful immigrants who have been imprisoned for violations of State criminal laws, 8 U.S.C. § 1231(i),

to generally preclude immigrants who are not lawfully within this country from receiving State and local public benefits, 8 U.S.C. § 1621, and to mandate federal and State cooperation and communication regarding immigration issues, 8 U.S.C. §§ 1373, 1644.

IRCA, too, reflects Congress's recognition of the continuing role States play in this area. In adopting the first-ever federal law penalizing employers for hiring unauthorized aliens, Congress could have expressly preempted States from that entire field. Congress likewise could have expressly preempted States from investigating and adjudicating employers' alleged hiring of unauthorized aliens. And Congress could have expressly preempted States from imposing any sanctions for employers' violations of federal immigration laws. It did none of those things. To the contrary, IRCA is silent on State investigations and adjudications of employers' misconduct, and expressly preserves the States' authority to impose "sanctions . . . through licensing and similar laws." 8 U.S.C. § 1324(a)(h)(2).

By authorizing States to sanction employers through license denials and revocations, IRCA ensures that the full panoply of sanctions is available against employers who illegally hire unauthorized aliens. While the federal government is fully capable of imposing civil fines and criminal penalties, the revocation of State-issued licenses is peculiarly within the province of the States themselves. IRCA's savings clause preserves States' longstanding power to regulate business entities to which State licenses

were issued and States' traditional power to revoke licenses to do business as a sanction for violating immigration laws.

The Act falls squarely within IRCA's savings clause. The law provides for the revocation or suspension of State-issued licenses. And to be consistent with federal law, it uses the federal definition of unauthorized alien, A.R.S. § 23-211(11), adopts federal scienter standards, incorporates a defense for good faith compliance with the I-9 process, A.R.S. §§ 23-212(J), -212.01(J), and establishes a rebuttable presumption that a worker is lawful if the employer uses the E-Verify program, A.R.S. § 23-212(I), -212.01(I). The Arizona law is a permissible complement to federal enforcement efforts, and is consistent with the plain language, structure, and history of IRCA.

A. Federal Law Does Not Expressly Preempt Arizona's Employer Sanctions Statute.

1. Arizona's Statute Is Consistent with the Plain Language of IRCA's Savings Clause.

a. The express-preemption analysis "'must in the first instance focus on the plain wording of the [preemption] clause, which necessarily contains the best evidence of Congress' pre-emptive intent.'" *Sprietsma v. Mercury Marine*, 537 U.S. 51, 62 (2002) (quoting *CSX Transp., Inc. v. Easterwood*, 507 U.S. 658, 664 (1993)). That principle is a straightforward

application of the more general rule that statutory construction "begins with the plain language of the statute." *Jimenez v. Quarterman*, 129 S. Ct. 681, 685 (2009). The preemption clause at issue here provides:

> The provisions of this section preempt any State or local law imposing civil or criminal sanctions (*other than through licensing and similar laws*) upon those who employ, or recruit or refer for a fee for employment unauthorized aliens.

8 U.S.C. § 1324a(h)(2) (emphasis added). Congress thereby preempted States from imposing "civil and criminal sanctions" on employers, but specifically preserved State authority to impose sanctions "through licensing and similar laws."

The plain meaning of "licensing and similar laws" encompasses a law that revokes a business's State-issued authorization to do business in the State. Although Petitioners denigrate the use of dictionaries to determine the plain meaning of a statute, *see* Pet. Br. 27, that is the standard means of doing so when a term is not defined. *See, e.g., Johnson v. United States*, 130 S. Ct. 1265, 1270 (2010); *Smith v. United States*, 508 U.S. 223, 228-229 (1993). Both Petitioners and the United States cite *Webster's Third New International Dictionary* 1304 (1993), which defines the term "license" as a "right or permission granted in accordance with law by a competent authority to engage in some business or occupation." The "licenses" subject to revocation under Arizona's law – "any agency permit, certificate, approval, registration,

charter or similar form of authorization that is required by law and that is issued . . . for the purposes of operating in the business in this state," including articles of incorporation, certificates of partnership, foreign corporation registrations, and transaction privilege licenses, A.R.S. §§ 23-211(9)(a), (b) – fall comfortably within that definition.

To become authorized to do business as an Arizona corporation, an entity must file articles of incorporation with the Arizona Corporation Commission, A.R.S. § 10-201, and thereby subject itself to the longstanding sanction of dissolution, through administrative or judicial proceedings, for certain violations of law. A.R.S. §§ 10-1420 to -1422 (administrative dissolution); 10-1430 to -1434 (judicial dissolution). As this Court has observed, it "is an accepted part of the business landscape for States to create corporations [and] to prescribe their powers." *CTS Corp. v. Dynamics Corp. of Am.*, 481 U.S. 69, 91 (1987); *see also Trs. of Dartmouth College v. Woodward*, 17 U.S. (4 Wheat.) 518, 636 (1819) ("A corporation is an artificial being, invisible, intangible, and existing only in contemplation of law. Being the mere creature of law, it possesses only those properties which the charter of its creation confers upon it. . . ."). Put another way, State-issued articles of incorporation are "a right or permission granted in accordance with law by a competent authority to engage in some business or occupation." *See Webster's Third New International Dictionary* at 1304.

Business entities must likewise file certificates of partnership, A.R.S. § 23-211(9)(b)(ii), foreign corporation registrations, A.R.S. § 10-1503, and transaction privilege licenses, A.R.S. § 42-5008 to obtain the authority to engage in specified conduct within Arizona and to receive certain protections that Arizona law provides. Indeed, this Court has often referred to State-issued registrations to transact business as a foreign corporation as "licenses." *See, e.g.*, *Helicopteros Nacionales de Columbia, S.A. v. Hall*, 466 U.S. 408, 417 (1984); *G.D. Searle & Co. v. Cohn*, 455 U.S. 404, 413 n.8 (1982); *Eli Lilly & Co. v. Sav-on-Drugs, Inc.*, 366 U.S. 276, 282 (1961); *see also Bendix Autolite Corp. v. Midwesco Enters., Inc.*, 486 U.S. 888, 899 (1988) (Rehnquist, C.J., dissenting) (referring to State's "licensure of a foreign corporation").

All told, the sanction of revoking various forms of authorization to do business in the State that Arizona's law imposes fall within the plain meaning of the savings clause in 8 U.S.C. § 1324a(h)(2). Several additional considerations buttress that conclusion. First, when Congress has intended to limit a measure to a specific type of license, it has expressly done so. *See, e.g.*, 8 U.S.C. § 1621(c) (defining "state and local public benefit" subject to eligibility restrictions based on immigration status to include "professional and commercial licenses"); 42 U.S.C. § 666(a)(16) (requiring that States have procedures to restrict "driver's licenses, professional and occupational licenses, and recreational and sporting licenses" of people owing child support). Second, the savings clause covers

"licensing *and similar laws*," 8 U.S.C. 1324a(h)(2), indicating an intent broadly to cover documents or laws that provide employers permission to engage in certain activities.

Third, the presumption against preemption dictates that the preemption analysis begin "'with the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was a clear and manifest purpose of Congress.'" *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 485 (1996) (quoting *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947)). Accordingly, "when the text of a pre-emption clause is susceptible of more than one plausible reading, courts ordinarily 'accept the reading that disfavors pre-emption.'" *Altria Group, Inc. v. Good*, 129 S. Ct. 538, 543 (2008) (quoting *Bates v. Dow Agrosciences LLC*, 544 U.S. 431, 449 (2005)). This Court recognized in *DeCanas* that the presumption applies in this precise context, 424 U.S. at 357, and IRCA's enactment "does not negate [its] operation. . . . The applicability of the presumption turns on a state's *historic* police powers. By definition, that means that the presumption depends on the *past* balance of state and federal regulation, not the present." *Lozano v. City of Hazleton*, No. 07-3531, 2010 WL 3504538, at *29 (3d Cir. Sept. 9, 2010). Even if the phrase "licensing and similar laws" were ambiguous – and it is not – any ambiguity must be resolved in the State's favor.

b. Petitioners and their amici's efforts to overcome that plain language and presumption are unavailing. First, Petitioners and the United States argue that Arizona's law is not a "licensing law" within IRCA's savings clause because it is not part of a statutory scheme through which licenses are issued. Pet. Br. 34-35; U.S. Br. 10-12. It is difficult to fathom, however, how a State law that specifically addresses the *revocation* of a license is any less a "licensing and similar law" than a State law that specifically addresses the *issuance* of a license. It cannot be that IRCA permits a State to deny a license to a business entity based on that entity's past hiring of unauthorized aliens, but does not permit a State to revoke a license for that same reason. At bottom, their objection appears to be about the organization of Arizona's State code in which the State's power to revoke various licenses appears in a different section than the sections in which the State's power to issue those licenses is specified. It is commonplace, however, that the substance of State law, and not its form, controls. *See United States v. Eurodif S.A.*, 129 S. Ct. 878, 887 (2009) ("in reading regulatory and taxation statutes, form should be disregarded for substance") (internal quotation marks omitted). It does not matter whether the sanctions against various licenses are established through a single statute, as Arizona has chosen to do, or by amendments to the various statutes governing specific licenses.

Second, and relatedly, the United States argues that the licenses that Arizona's law covers are not within the savings clause because they pertain to the entity's "very *existence*," whereas a business that loses its license remains a "going concern." U.S. Br. 15-16. The consequence of losing a critical business license that requires a cessation of the company's operations, however, is similar to a suspension or revocation of articles of incorporation. Although theoretically a business that loses its license may remain a "going concern," it cannot do the business that it was established to do. A law or medical practice whose members have lost their licenses to practice law or medicine might still *exist*, and its members might find some other way to earn a living. But it would be passing strange to characterize their new jobs as part of a "going concern" in any way connected to their previous work.

Finally, Petitioners insist that the savings clause authorizes a State to impose sanctions only after a *federal* tribunal has determined that the employer violated IRCA by hiring an unauthorized alien. Pet. Br. 28-30. Not a single word in IRCA imposes that limitation on a State's exercise of the powers that the savings clause preserved. The savings clause itself, of course, says nothing of the sort. Any suggestion that Congress *expressly* preempted States from investigating and adjudicating whether State entities are

unlawfully hiring unauthorized aliens as a predicate to applying a licensing sanction is untenable.[7]

2. IRCA's Purpose and History Support the Conclusion that It Does Not Preempt Arizona's Employer Sanctions Law.

The savings clause ensures that a full range of sanctions is available to be used against businesses that employ unauthorized aliens. IRCA authorizes the federal government to impose civil fines and criminal sanctions against employers that knowingly employ unauthorized aliens, while leaving to the States their uniquely sovereign power to revoke or suspend State-issued licenses. *See Hopkins Fed. Sav. & Loan Ass'n v. Cleary*, 296 U.S. 315, 336-38 (1935) (holding that the dissolution of State-chartered corporations is a matter of State law and that the Tenth Amendment bars Congress from authorizing a federal agency to dissolve such corporations "in other ways and for other causes" than State law permits); *United States v. Snyder*, 852 F.2d 471, 474-75 (9th Cir. 1988) (invalidating on Tenth Amendment grounds portion of federal sentence requiring surrender of State-issued driver's license). By leaving licensing sanctions to the States, Congress retained that important penalty for

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[7] Petitioners' contention that States are *impliedly* preempted from investigating and adjudicating whether employers have violated IRCA by hiring unauthorized aliens is separately addressed in § I(B), *infra*.

wrongdoing while sidestepping any potential constitutional objections and avoiding "upset[ting] the usual constitutional balance of federal and state powers." *Gregory v. Ashcroft*, 501 U.S. 452, 460 (1991).

The United States nonetheless contends that "it would be exceedingly odd for Congress to have precluded [States from imposing] small fines but permitted sanctions that suspend or terminate a business entity's very existence." U.S. Br. 22-23. But Petitioners' position has that effect, however, for it allows (for example) a State to revoke a doctor's license to practice medicine – thereby depriving him of his profession – yet bars the State from imposing a $10 fine upon the doctor. Congress did not divide sanctions so that the federal government got to impose the large ones and the States the small ones. It divided sanctions responsibility by category, allowing States and local governments to impose licensing sanctions large and small. *See also Lozano*, 2010 WL 3504538, at *31 ("Nowhere in IRCA's text or legislative history is there an indication that Congress intended [the savings clause] to apply only to licensing laws that impose minor penalties, and not to licensing laws that impose more significant sanctions.").

IRCA's history also supports the conclusion that IRCA does not preempt Arizona's law. Congress considered employer sanctions for several years before it enacted IRCA in 1986, but it did not include the express preemption provision with a savings clause until the bill was introduced in 1985. 131

Cong. Rec. 13,590 (1985). The only discussion of preemption of State employer sanctions is found in the House Judiciary Committee Report:

> The penalties contained in this legislation are intended to specifically preempt any state or local laws providing civil fines and/or criminal sanctions on the hiring, recruitment or referral of undocumented aliens.
>
> They were not intended to preempt or prevent lawful state or local processes concerning the suspension, revocation or refusal to reissue a license to any person who has been found to have violated the sanctions provisions in this legislation. Further, the Committee does not intend to preempt licensing or "fitness to do business laws," such as state farm labor contractor laws or forestry laws, which specifically require such licensee or contractor to refrain from hiring, recruiting or referring undocumented aliens.

H.R. Rep. No. 99-682(I) at 58.

Petitioners assert that this passage and the relationship between IRCA and the Migrant and Seasonal Agricultural Workers Protection Act (AWPA), 29 U.S.C. §§ 1801 to 1872 show that (1) Congress intended the savings clause to embrace only "fitness-to-do-business laws governing farm labor contractors" and similar laws and (2) Congress intended that a federal proceeding must occur before a State can impose licensing sanctions. Of course, Congress's "authoritative statement is the statutory text, not the

legislative history." *Exxon Mobil Corp. v. Allapatah Servs., Inc.*, 545 U.S. 546, 568 (2005); *see also Hoffman Plastic Compounds, Inc. v. NLRB*, 535 U.S. 137, 150 n.4 (2002) (describing House Report No. 99-682 as a "single Committee Report from one House of a politically divided Congress" and noting that the dissent's reliance on the report "is a rather slender reed"). In any event, Petitioners' arguments fail on their own terms.

a. To be sure, the House Report specifies farm labor contractor laws as an example of a non-preempted State licensing law. But the Report did not state, or even imply, that such laws – or substantially identical laws – constitute the sum and substance of the exception. To the contrary, the sentence discussing farm labor contractor laws begins with the word "further" and follows a sentence that more generally states that the preemption clause was "not intended to preempt or prevent lawful state or local processes concerning the suspension, revocation or refusal to reissue a license to any person who has been found to have violated the sanctions provisions in this legislation." It is difficult to imagine a broader description of the "licensing and similar laws" carve-out.

Nor does IRCA's relationship with AWPA suggest a narrow, atextual reading of the savings clause. IRCA included "conforming amendments" that permitted the Secretary of Labor to suspend, revoke, or refuse to issue a federal farm labor contract certificate if the employer had been found to violate IRCA. IRCA § 101(b)(1)(B) (codified at 29 U.S.C. § 1813ll(a)).

Under the amendments, the procedures under IRCA, rather than a separate proceeding at the Department of Labor, determine whether a farm labor contractor has unlawfully employed an unauthorized alien. *Id.* This bears on the meaning of the savings clause, Petitioners insist, because AWPA (and its predecessor) imposed a federal licensing regime upon farm labor contractors and expressly provided that "compliance with this chapter shall not excuse any person from compliance with appropriate State law and regulation." 29 U.S.C. § 1871. According to Petitioners, IRCA's savings clause was designed to ensure that States may continue to impose "State law and regulation[s]" on farm labor contractors, and on no other State license. Pet. Br. 32-34.

As an initial matter, "it is ultimately the provisions of our laws rather than the principal concerns of our legislators by which we are governed." *Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75, 79 (1998). Congress did not limit the savings clause to "farm labor contractors" or to "fitness-to-do-business" laws; it covers all "licensing and similar laws." Moreover, the evidence that Congress adopted the savings clause solely or primarily to preserve existing State licensing laws relating to farm labor contractors is exceedingly thin. All Petitioners can point to is the pre-IRCA existence of AWPA's antipreemption provision (which itself was not limited to licensing measures) and the above-quoted passage from the House Report, which, as noted, describes the exception in far broader terms. In the end, nothing in IRCA's

amendments to AWPA supports the conclusion that Congress intended to preempt the States' ability to revoke or suspend employers' licenses, including articles of incorporation and similar State authorizations.

b. In support of their contention that the savings clause authorizes a State to impose sanctions only after a federal tribunal has found an IRCA violation, Petitioners point to the sentence in the House Report stating that the preemption provision was "not intended to preempt or prevent lawful state or local processes concerning the suspension, revocation or refusal to reissue a license to any person who has been found to have violated the sanctions provisions *in this legislation*." H.R. Rep. No. 99-682(I) at 58, *quoted in part in* Pet. Br. 29. That sentence is perfectly consistent with the State's construction of the savings clause. It expressly authorizes "state or local processes." It merely notes that a State may impose a license sanction only upon a person who has been found to have violated IRCA. The House Report does not declare that the violation has to have been determined through a federal adjudication. Any ambiguity regarding authorization for State adjudication is resolved by the next sentence that preserves State laws "which specifically require such licensee or contractor to refrain from hiring, recruiting, or referring undocumented aliens." H.R. Rep. No. 99-682(I) at 58. Arizona's law operates in precisely that fashion. An Arizona employer is subject to sanction only if it knowingly or intentionally hires an "unauthorized

alien," A.R.S. §§ 23-212, -212.01, which is defined to "mean[ ] an alien who does not have the legal right or authorization under federal law to work in the United States as described in 8 [U.S.C. §] 1324a(h)(3)."

The only confusing note is that the Report speaks of "violat[ing] the *sanctions* provision in this legislation." Given that employers are subject to, and can only violate, the *substantive* provisions of IRCA (thereby subjecting themselves to the statute's sanctions), the best reading of the Report's language is that it describes States' authority to invoke their processes to impose licensing sanctions on entities that have knowingly employed unauthorized aliens. At worst, the House Report is ambiguous – and therefore does not advance Petitioners' countertextual claim that a federal proceeding must precede a State licensing sanction.

Because Congress preserved State authority to impose sanctions through "licensing and similar laws," federal law does not expressly preempt Arizona's employer sanctions law that provides for the suspension and revocation of State licenses. The savings clause and the express preemption provision ensure that a range of sanctions against businesses that employ unauthorized aliens are available. Consequently, the federal government may impose the civil and criminal sanctions against employers that knowingly employ unauthorized aliens, and States may revoke or suspend State-issued licenses.

B. Arizona's Employer Sanctions Law Does Not Impliedly Conflict with Federal Law.

Implied conflict preemption exists "where it is impossible for a private party to comply with both state and federal requirements, or where state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Spreitsma*, 537 U.S. at 65. It requires an "actual conflict." *English v. Gen. Elec. Co.*, 496 U.S. 72, 90 (1990) (internal quotation marks omitted). Tension between federal and State law is not enough to establish implied conflict preemption. *Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238, 256 (1984).

Petitioners and the United States assert that Arizona's law impliedly conflicts with IRCA by imposing the sanction of revoking or suspending business licenses, by authorizing State officials and bodies to investigate and adjudicate claims, and by "disrupt[ing] the careful balance that Congress struck." Pet. Br. 37. None of those claims can be reconciled with the scope of State authority Congress expressly reserved, with Congress's refusal to expressly preempt State authority beyond the power to impose civil and criminal sanctions, and with the Arizona law's careful incorporation of myriad federal laws and standards.

1. The State's Authority to Impose Sanctions that are Against State Licenses Does Not Disrupt the Balance That Congress Struck in IRCA.

The savings clause for State sanctions "through licensing and similar laws" is part of the careful balance of competing interests that Congress struck when it enacted IRCA. Although a savings clause does not altogether eliminate the possibility of implied conflict preemption, its existence strongly reflects Congress's decision about the scope of State authority regarding employer sanctions. *Freightliner Corp. v. Myrick,* 514 U.S. 280, 288 (1995) ("[A]n express definition of the preemptive reach of a statute 'implies' – *i.e.*, supports a reasonable inference – that Congress did not intend to pre-empt other matters."); *Cipollone v. Liggett Group,* 505 U.S. 504, 517 (1992) ("Congress' enactment of a provision defining the preemptive reach of a statute implies that matters beyond that reach are not preempted."). A State does not disrupt the balance that IRCA struck when it investigates, adjudicates and imposes sanctions that are within IRCA's savings clause.

Moreover, Arizona's law authorizes State sanctions for conduct that is already illegal under federal law, A.R.S. §§ 23-212(A), -212.01(A); 8 U.S.C. §§ 1324a(a), and, as previously explained, the only sanctions that it authorizes are against State licenses. Arizona's law relies on the federal definition of unauthorized alien, A.R.S. § 23-211(11), incorporates defenses for

employers that are included in the federal law, A.R.S. §§ 23-212(I), (J), -212.01(I), (J), includes the federal scienter requirement, A.R.S. § 23-211(7), and requires that State investigators rely on federal information when determining whether a person is an unauthorized alien, A.R.S. §§ 23-212(B), (H), -212.01(B), (H). This law presents no actual conflict with any IRCA requirement.[8]

Arizona's law merely exercises the authority that Congress preserved for States in the savings clause, and it does so in a way that does not conflict with IRCA's requirements. Therefore, it is not preempted.

2. Arizona's Investigations and Adjudications of Claims that an Employer Knowingly or Intentionally Employs Unauthorized Aliens Do Not Conflict With IRCA.

a. As described in the express preemption analysis above, IRCA established procedures for federal investigations and adjudications, 8 U.S.C. § 1324a(e), (f), (g), but did not establish procedures for State adjudications or require completion of a federal adjudication as a prerequisite for a State

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[8] In contrast, the local ordinance recently held that the Third Circuit conflicted with IRCA provided no I-9 defense to contractors (*Lozano*, 2010 WL 3504538 at *37) and applied to independent contractors (*id.* at *34). It also authorized sanctions against a business without any prior judicial or administrative proceedings (*id.*).

licensing enforcement action. The previous analysis demonstrates that nothing in IRCA's text or legislative history supports prohibiting a State from investigating and adjudicating claims within the savings clause.

That Congress established procedures for federal investigations and adjudications in IRCA does not indicate any intent to oust State authority to investigate and adjudicate claims within the savings clause. This Court has long recognized that "[t]he mere existence of a federal regulatory or enforcement scheme, even one [that is] detailed does not by itself imply pre-emption of state remedies." *English*, 496 U.S. at 87; *see also N.Y. State Dep't of Social Servs. v. Dublino*, 413 U.S. 405, 415 (1973) (preemption cannot "be inferred merely from the comprehensive character" of the federal law). IRCA is silent on the subject of State procedures, and "matters left unaddressed [in a federal regulatory scheme] are presumably subject to state law." *O'Melveny & Myers v. FDIC*, 512 U.S. 79, 85 (1994). Arizona's investigations and adjudications merely implement the State sanctions that Congress authorized in its savings clause. When Congress explicitly preserves a State remedy, it follows that a federal enforcement scheme does not impliedly preempt the predicate investigations and adjudications.

Permitting State investigations and adjudications to impose sanctions against employers for infractions that are within IRCA's savings clause is consistent with principles that typically govern State

authority. *See Bates,* 544 U.S. at 442 (recognizing State authority to determine whether federal requirements are violated and to make a violation of federal law a State offense). State courts as well as federal courts are "entrusted with providing a forum for the vindication of federal rights," *Haywood v. Brown,* 129 S. Ct. 2108, 2114 (2009), and State courts typically have the authority to resolve questions involving State or federal law, *see, e.g., Tafflin v. Levitt,* 493 U.S. 455, 458 (1990) (concluding that State courts have jurisdiction over federal RICO claims). Petitioners cite no authority supporting a finding that State investigations and enforcements conflict with federal law when Congress has specifically preserved a State remedy.

b. The specific procedures used in Arizona's investigations and adjudications also do not conflict with federal law. Although no federal law requires that it do so, Arizona requires that its State investigations rely exclusively on information from federal authorities regarding an employee's work authorization. A.R.S. §§ 23-212(B), -212.01(B). The State must request information from the federal authorities through 8 U.S.C. § 1373(c), which requires federal authorities to "respond to an inquiry by a Federal, State, or local government agency, seeking to verify or ascertain the citizenship or immigration status of any individual . . . for any purpose authorized by law, by providing the requested verification of status information." In addition to this information concerning work authorization, local authorities need evidence

that the employer "knowingly" or "intentionally" employed the unauthorized alien before they can file an action to seek sanctions against a State license. A.R.S. § 23-212(A), -212.01(A); Ariz. R. Civ. P. 65.2(B) (requiring that complaints in sanctions actions include the "facts alleged to show that the employer intentionally or knowingly employed unauthorized aliens").

Petitioners criticize Arizona's law for providing that the information from the federal government regarding an employee's work authorization creates only "a rebuttable presumption of the employee's lawful status." Pet. Br. 40; A.R.S. § 23-212(H). This rebuttable presumption ensures that the employer has an opportunity to rebut the evidence presented to establish a worker's unlawful status. The county attorney must rely on the information from the federal government regarding an employee's work authorization in presenting its case, A.R.S. §§ 23-212(B), (H), -212.01(B), (H), but the employer necessarily has an opportunity to rebut the evidence presented. Nothing in IRCA precludes a State from giving an employer the opportunity to rebut the evidence presented concerning the work authorization, and this procedure ensures that the employer has the opportunity to present any defenses to the court before sanctions are imposed.[9] This rebuttable

[9] Ironically, in the proceedings below, Respondents argued that Arizona's statutory scheme violated employers' due process rights because it precluded them from rebutting the immigration

(Continued on following page)

presumption therefore does not conflict with federal law.[10]

Arizona's law also incorporates the federal law's affirmative defense for employers that in good faith comply with the I-9 process and the favorable presumption for using E-Verify. A.R.S. §§ 23-212(H), (I), -212.01(H), (I); 8 U.S.C. § 1324a(a)(3); IIRIRA, § 404(h)(1). Yet Petitioners allege that including these defenses conflicts with federal laws limiting the use of the I-9 forms and E-Verify information. Pet. Br. 42 (citing 8 U.S.C. §§ 1324a(b)(5), 1324a(b)(4), 1324a(d)(2)(F); IIRIRA, § 404(h)(1)); *see also* U.S. Amicus Br. 24.

These provisions in federal law do not prevent an employer from using the I-9 forms or E-Verify information to establish defenses in a State enforcement

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status information that federal authorities provide. Pet. App. 23a-24a. The court of appeals and the district court both rejected this argument, accepting Respondents' analysis that State law permitted employers to rebut the information regarding immigration status. *Id.* 25a.

[10] Petitioners question whether the information provided under 8 U.S.C. § 1373(c) will, in all circumstances, establish whether an employee is an unauthorized alien. As a practical matter, if the information from the federal authorities does not establish that a person is an unauthorized alien, it means that the county attorney cannot satisfy his burden of proof in an enforcement action. Nevertheless, speculation about how the law might work in a particular case is not a basis for preemption. *English*, 496 U.S. at 90 (stating that allegations concerning possible future occurrences were "too speculative a basis on which to rest a finding of preemption").

action against the employer's license. Section 1324a(b)(4) limits an employer's authority to copy the information it receives through the I-9 process, for purposes other than "complying with the requirements of this subsection." Paragraph (5) restricts the use of the I-9 form "for purposes other than *enforcement* of this chapter [IRCA]" and specified criminal laws. The reference to enforcement indicates that paragraph (5) limits the government's use of the form, not the employer's. Because IRCA's savings clause authorizes State action to impose licensing sanctions against employers, an employer should be able to use the forms to establish an affirmative defense of good faith compliance with the I-9 process in a sanctions proceeding in State court.

For the same reasons, IIRIRA, § 404(h)(1) does not prohibit an employer from using E-Verify information as a defense in a State enforcement action against a State license. Subsection (h)(1) prohibits "any department, bureau, or other agency of the United States government [from] utiliz[ing] [E-Verify information] for any other purpose other than as provided for under a pilot program." This language restricts the government's use of the E-Verify information, but it does not restrict an employer from using E-Verify information in an enforcement action to earn a rebuttable presumption that an employee is authorized to work in this country.

In any case, whether either issue ever arises is speculative. Indeed, the United States argues only that "employers *will likely* need to use the I-9 forms"

to establish an affirmative defense in a sanctions proceeding. U.S. Amicus Br. 25. (Emphasis added). An employer may choose to establish good faith compliance with I-9 processes in another way, such as through testimony of employees and descriptions of office policy. As a practical matter, the E-Verify issue is unlikely to arise because Arizona officials must rely on information from the federal authorities regarding an employee's work authorization in order to bring a sanctions action in the first place. Therefore, if the employer is using E-Verify to confirm the employee's status through the federal databases, most likely no sanctions case would ever be filed.

Arizona's processes for investigation and adjudicating complaints are reasonable measures to implement sanctions that are within IRCA's savings clause. Prohibiting States from investigating and adjudicating complaints that an employer is knowingly or intentionally employing unauthorized aliens would restrict the State's independent exercise of prosecutorial discretion by conditioning a State's ability to take action against a State licensee on a prior federal action, which may never occur. *See Immigration Enforcement at the Workplace: Learning from the Mistakes of 1986: Hearing Before the Subcomm. on Immigr., Border Sec., and Citizenship of the S. Comm. on the Judiciary*, 109th Cong. 13 (2006) (statement of Richard M. Stana, Dir. of Homeland Sec. & Justice, U.S. Gov. Accountability Office) (noting that "worksite enforcement has been a relatively low priority" and DHS focused resources on national security cases).

There is no evidence that Congress attempted to so restrict States' ability to impose sanctions against its licensees. Because Arizona's procedures do not conflict with IRCA, Arizona's law is not preempted.

3. Arizona's Law Does Not Conflict with Federal Law by Disrupting the Balance that Congress Struck Regarding Possible Discrimination or the Potential Burdens on Employers.

Arizona's law need not attempt to further all of the interests that Congress considered when enacting IRCA to avoid conflict preemption. *Gade v. Nat'l Solid Wastes Mgm't Ass'n*, 505 U.S. 88, 111 (1992) (Kennedy, J., concurring in part and concurring in the judgment) (noting that conflict preemption analysis should not be "[a] free wheeling judicial inquiry into whether a state statute is in tension with federal objectives"); *Pension Benefit Guar. Corp. v. LTV Corp.*, 496 U.S. 633, 646 (1990) ("[T]here are numerous federal statutes that could be said to embody countless policies."). Arizona's law need only avoid an actual conflict with federal requirements. *English*, 496 U.S. at 90 (stating that the Court does not "seek[ ] out conflicts . . . where none clearly exists") (internal quotation marks omitted).

When Congress enacted IRCA, it included new protections against "discrimination based on national origin or citizenship status." 8 U.S.C. § 1324b. Arizona's law does not undermine the existing protections

against discrimination in State and federal law in any way. *See, e.g.*, 8 U.S.C. § 1324b (prohibiting discrimination based on national origin or citizenship status); 42 U.S.C. § 2000e-2 (prohibiting employment discrimination based on "race, color, religion, sex, or national origin"); A.R.S. § 41-1463(B) (prohibiting employment discrimination based on "race, color, religion, sex, age, disability or national origin"). Although Arizona did not include any additional antidiscrimination protections in its law, Congress did not require States to do so in order to exercise their authority to impose sanctions through "licensing and similar laws." 8 U.S.C. § 1324a(h)(2).

Plaintiffs are wrong to assert that Arizona's employer sanctions statute attempts to prevent unlawful immigration without any concern about potential discrimination. Pet. Br. 45. Although it did not add any new civil rights remedies, Arizona's Legislature explicitly required that the Act "shall not be construed to require an employer to take any action that the employer believes in good faith would violate federal or state law." A.R.S. § 23-213. And it prohibited the State from investigating complaints based solely on a person's "race, color or national origin." A.R.S. §§ 23-212(B); -212.01(B). To deter potential abuses, "false and frivolous complaints" are subject to criminal penalties. *Id.*

It is also wrong to suggest that Arizona's law disregards IRCA's balance with regard to employers. The penalties for false reports protect employers. The judicial proceeding before any sanctions are imposed

protects employers. Arizona also attempts to prevent violations by requiring employers to use E-Verify. In addition, the Legislature severely restricted the investigative authority of local officials by giving them no subpoena power or other authority to require witnesses to provide documents or testimony in employer sanctions investigations. *Compare* A.R.S. § 23-212(A), (B), (C) *with* A.R.S. §§ 38-431.06 (authorizing Attorney General to obtain documents and examine witnesses as part of open meeting law investigations); 41-1403 (similar provisions regarding civil rights investigations); 44-1406 (similar authority regarding anti-trust investigations); 44-1524 (similar authority regarding consumer fraud investigations). Although the threat of a sanction against a State license is a serious matter, IRCA preserved State authority to impose such sanctions against a business. The possibility of those sanctions is part of the balance that IRCA struck.

Nor does Arizona's law undermine IRCA's mandate for "vigorous[ ] and uniform[ ]" enforcement. IRCA § 115. The risk of sanctions against licenses in multiple jurisdictions is part of the balance that IRCA struck by preserving State authority to impose sanctions against State licenses.

Permitting States to take actions against licensees who are knowingly employing unauthorized aliens supports the Congressional interest in "vigorous[ ] . . . enforcement" and respects the savings clause for State enforcement against State licensees. IRCA § 115. In contrast, prohibiting the States from

taking any action against the license of an employer unless and until the federal government has completed its own enforcement action against that employer undermines both the savings clause and Congress's interest in vigorous enforcement.

Moreover, State authority is not limited in this context merely because the issues relate to immigration. Ordinary preemption doctrine applies to matters that touch on immigration. *DeCanas,* 424 U.S. at 360. *DeCanas* recognized the State's strong interest in avoiding the harms to wages and working conditions that may result from the presence of unauthorized workers. Although social scientists may debate the impact of unlawful immigration, in its order denying an injunction pending appeal, the district court found that Arizona's unauthorized alien population adversely impacts wages in Arizona. Add19.

It is also not unusual for State officials to address issues concerning immigration status. For example, federal law mandates that State and local officials administering certain public benefits make eligibility determinations based on the applicant's citizenship or immigration status. *E.g.,* 8 U.S.C. §§ 1611, 1621. Arizona considers immigration status when issuing driver's licenses. A.R.S. § 28-3153(D) (requiring "proof satisfactory to the department that the applicant's presence in the United States is authorized under federal law"). Under Arizona law, immigration status is relevant to bail determinations. Ariz. Const. art. II, § 22 (stating that bail not available for serious felonies "if the person charged has entered or remained

in the United States illegally").[11] And the issue of a person's immigration status may arise in a number of State proceedings, including, for example, wrongful termination cases, *e.g., Incalza v. Fendi N. Am., Inc.*, 479 F.3d 1005, 1008 (9th Cir. 2007) (originally filed in State court but removed to federal court), worker's compensation benefits, *e.g., Felix v. State ex rel. Wyo. Workers' Safety & Comp. Div.*, 986 P.2d 161, 163 (Wyo. 1999), and child welfare cases, *e.g., Jesus M. v. Ariz. Dep't of Econ. Sec.*, 53 P.3d 203, 207 (Ariz. App. 2002). There are many more examples.

The significant local interests relevant here distinguish this case from those that more directly concern foreign affairs. For example, both *Crosby v. National Foreign Trade Council*, 53 U.S. 363 (2000) and *American Insurance Ass'n v. Garamendi*, 539 U.S. 396 (2003), addressed foreign affairs issues that involved weaker State interests than those that are at stake here. *Garamendi*, 539 U.S. at 425 (noting weak State interest in requiring disclosure of Holocaust-era insurance policies); *Crosby*, 53 U.S. at 379-80 (noting that State law concerning sanctions against Burma undermined President's ability to speak for the Nation with one voice on the issue). And, unlike the State alien registration law at issue in *Hines v. Davidowitz*, 312 U.S. 52, 64-66 (1941), this legislation imposes no unique burdens on noncitizens,

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[11] The Arizona Court of Appeals upheld the constitutionality of this provision in *Hernandez v. Lynch*, 167 P.3d 1264, 1275 (Ariz. App. 2007).

but rather focuses on the responsibilities of employers within the State.

At bottom, Petitioners' conflict preemption argument asks the Court to use the implied conflict preemption theory to rewrite IRCA's savings clause. The Court should decline to do so. It is up to Congress to determine whether to modify IRCA's savings clause. *See Pac. Gas & Elec. Co. v. State Energy Res. Conservation & Dev. Comm'n,* 461 U.S. 190, 223 (1983) ("[g]iven this statutory scheme, it is for Congress to rethink the division of regulatory authority" between the States and the federal government).

Congress itself explicitly declined to preempt all State authority to impose sanctions against employers who knowingly employ unauthorized aliens. Instead, it expressly preserved State authority to impose sanctions through licensing and similar laws. 8 U.S.C. § 1324a(h)(2). Arizona's law merely exercises the authority Congress preserved in IRCA's savings clause. It does not conflict with IRCA, and it therefore is not preempted.

II. FEDERAL LAW DOES NOT PREEMPT ARIZONA'S E-VERIFY REQUIREMENT.

Arizona's requirement that employers within its jurisdiction use the federal E-Verify program is also not impliedly preempted. Although federal law does not require all employers throughout the country to use E-Verify, Arizona's E-Verify requirement does not make it impossible to comply with federal law or

create an obstacle to accomplishing federal goals. *See Cal. Coastal Comm'n v. Granite Rock Co.*, 480 U.S. 572, 581 (1987) (stating principles governing conflict-preemption analysis); *see also Spreitsma*, 537 U.S. at 65-70 (finding no preemption of State tort liability for failure to install propeller guard even though federal regulations did not require propeller guards).

An employer sanctions regime "cannot be effective without a reliable and easy-to-use method for employers to verify work authorization." S. Rep. No. 104-249, at 4 (1996). IRCA's verification system, which relied on the presentation of work authorization documents, was susceptible to widespread document fraud. *Id.* Congress authorized E-Verify, first as a limited pilot and later as a nationwide program, to develop a more effective system for verifying that new employees were authorized workers.

Congress has specifically prohibited the Secretary of Homeland Security from mandating the E-Verify program nationally, IIRIRA, § 402(a), but has not spoken to whether other federal entities, or States, may mandate use of E-Verify. This Court should not read such a prohibition into the statute.

First, it is beyond dispute that it is not "impossible for a private party to comply with both state and federal requirements." *Sprietsma*, 537 U.S. at 64 (citing *English v. General Elec. Co.*, 496 U.S. 79). Arizona employers will not violate the requirements of federal law if they comply with the State's E-Verify requirement. Thus, there is "no inevitable collision" between the requirements of the IIRIRA and the

verification statute. *Florida Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 142 (1963) (upholding State regulation of avocado maturity that was different from federal regulation).

Second, Arizona's requirement does not pose an obstacle to federal goals. The federal government's goal in developing and supporting E-Verify was not to establish a voluntary employee verification system, but to develop an effective one. *Cf.* IIRIRA, § 404(d) (establishing that the goals of the pilot programs were (1) to ensure reliability and ease of use for employers while protecting the privacy and security of the underlying information; (2) to respond to all inquiries from participating employers; (3) to prevent unauthorized disclosure of personal information; and (4) to ensure that the verification system did not cause unlawful discrimination practices). Department of Homeland Security Appropriations Act, 2010, Pub. L. No. 111-83, Title V, § 547, 123 Stat. 2142 (2009) (Appropriations bill noting that the E-Verify program was meant "to assist U.S. employers with maintaining a legal workforce").

A State E-Verify requirement helps advance the federal goals of having an effective verification system and a lawful workforce. A 2007 study of E-Verify indicated that one of the barriers to E-Verify's effectiveness had been a lack of employer participation, which "plac[ed] limitations on its effectiveness of preventing unauthorized employment on a national basis." 2007 Westat Report at xxii. Arizona's requirement facilitates expanding the program's use. From

April through June 2005, employers submitted only 217,000 cases to E-Verify. 2009 Westat Report at xxxii. In the period of April through June 2008, this amount had grown eightfold to 1.7 million cases. *Id.* Westat characterizes this rapid expansion as a strength of the E-Verify program. *Id.* Although it does not account for all of E-Verify's expansion, Arizona's E-Verify requirement clearly supports the program by creating an influx of new participants.

Contrary to Petitioners' argument,[12] nothing in the record suggests that Arizona's requirement or similar requirements by other States overburden the E-Verify program. As the United States acknowledges, "DHS advises in this case that the E-Verify system can accommodate the increased use that the Arizona statute and existing similar laws would create." U.S. Amicus Br. 34. This is consistent with congressional testimony of USCIS officials that Arizona's law did not siphon organizational resources away from the agency's E-Verify mission when it became effective. *Department of Homeland Security Appropriations for 2009, Hearing Before the H. Subcomm. on Homeland Sec. of the H. Comm. on Appropriations*, 110th Cong. 300 (2008) (statement of USCIS Director Emilio Gonzalez). In fact, the USCIS concluded as early as 2008 that the E-Verify program could handle the

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[12] Petitioners wrongly assert that if all fifty States required E-Verify, it would "overwhelm the federal system." Pet. Br. 50-51. Neither the record in this facial challenge nor the United States' brief in this case supports that statement.

verification workload if the program were mandatory for all U.S. employers. *Electronic Employment Verification Systems: Needed Safeguards to Protect Privacy and Prevent Misuse, Hearing Before the Subcomm. on Immigr., Citizenship, Refugees, Border Sec., and Int'l Law of the H. Comm. of the Judiciary*, 110th Cong. 52 (2008) (statement of Acting USCIS Director Jonathan Scharfen).

The United States' actions, prior to briefing before this Court, were consistent with this understanding and supported E-verify. When then-Arizona Governor Napolitano signed the Act in July 2007, she advised federal officials of Arizona's new requirement, JA 402, but heard no objection in response. In contrast, when Illinois attempted to ban the use of E-Verify in that jurisdiction, the United States promptly brought suit to enjoin Illinois' law. *United States v. Illinois,* No. 07-3261, 2009 WL 662703 (C.D. Ill. March 12, 2009).

Moreover, the United States pointed favorably to Arizona's law when it successfully defended the Executive Order and regulation requiring federal contractors to participate in the E-Verify program. In *Chamber of Commerce v. Napolitano*, 648 F. Supp. 2d 726 (D. Md. 2009), the United States successfully defended the Executive Order and subsequent regulation requiring federal contractors to participate in the E-Verify program. In that case, the United States disputed the notion that no one could require employers to participate in E-Verify as "patently and demonstrably false." Defs.' Reply Mem. in Supp. of Mot. for

Summ. J. at 7. According to the United States' brief in that case, IIRIRA, § 402(a) enjoined only the Secretary of Homeland Security – and no one else – from requiring participation. *Id.* The United States cited Arizona's law in support of that proposition and conceded that it was "permissible because the state of Arizona is not the Secretary of Homeland Security." *Id.* (citing *Chicanos Por La Causa*, 558 F.3d at 867). In conclusion, the United States argued that Congress "allows states to mandate [E-Verify's] use by public and private employers within their jurisdiction." *Id.* at 21-22.[13]

The United States now attempts to distinguish the federal government's requirement that its contractors use E-Verify based on the voluntary nature of the contractual relationship. U.S. Amicus Br. 29 n.10. Under Arizona law, however, the consequences of not using E-Verify are similar to the consequences under federal law. Arizona imposes no direct penalty against employers who do not comply with the mandate in A.R.S. § 23-214(A) that they "shall" use E-Verify. Under Arizona law, an employer that does not use E-Verify will not receive a rebuttable presumption in a sanctions action and is not eligible for economic

[13] The United States attempts to harmonize its position in this case with its arguments supporting an E-Verify requirement for federal contractors in *Chamber of Commerce v. Napolitano*. U.S. Amicus Br. 29, n.10. Their current position suggests that even if States cannot require all employers to use E-Verify, they can still require State contractors and State grant recipients to use E-Verify since those requirements are voluntary in nature.

development incentives from government entities. A.R.S. § 23-212(I); A.R.S. § 23-214(B). The employer would also not be listed on the Arizona Attorney General's website as an Arizona business that uses E-Verify. A.R.S. § 23-214(C).[14] This type of E-Verify requirement poses no more of an obstacle to Congress's goals than the federal government's E-Verify requirement for its contractors. Both further Congress's goals of improving the employee verification system and ensuring that employers hire people authorized to work in this country.

Petitioners and the United States place significant weight on *Geier v. American Honda Motor Co.*, 529 U.S. 861 (2000) but that decision is readily distinguishable. In *Geier,* the Court determined that imposing liability on car manufacturers for failing to install airbags conflicted with the federal law that gave manufacturers the option of selecting among different safety systems. *Id.* at 886. The Court was persuaded that mandating airbags through State tort law directly undermined the agency's policy of giving "more time for manufacturers to develop airbags or other, better, safer passive restraint systems." *Id.* at 879.

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[14] Petitioners filed their lawsuit in this case when the only consequence of not using E-Verify specified in statute was losing the benefit of a rebuttable presumption in a sanctions action. The Legislature added the other consequences in 2008. 2008 Ariz. Sess. Laws ch. 152.

Unlike the State law at issue in *Geier*, a State E-Verify requirement does not undermine the development of other verification systems. As described above, Congress experimented with three pilot programs beginning in 1996, but E-Verify is now the only one that remains. In *Geier,* the private marketplace was responsible for market innovations, and the federal agency responsible for highway safety did not want to thwart innovation by imposing a particular system. *Id.* at 879. Here, the federal government, not the private marketplace, develops the verification system. And requiring Arizona employers to participate in the E-Verify program advances Congress' interest in improving that employee verification system.

Petitioners' and the United States' reliance on *Buckman Co. v. Plaintiffs' Legal Committee*, 531 U.S. 341 (2001), is equally misplaced. In *Buckman,* the Court rejected a State-tort claim alleging "fraud on the Food and Drug Administration." Noting that federal law gave the FDA the responsibility to police fraud and that State tort regimes might create incentives to provide unnecessary information to the FDA and might deter applications for FDA approval of medical devices because of liability concerns, the Court determined that tort liability conflicted with the federal scheme. *Id.* at 349-51. A State E-Verify requirement creates none of those problems.

Petitioners rely on *Buckman* for the principle that the "relationship between a federal agency and

the entity it regulates is inherently federal in nature." Pet. Br. 50. Arizona requires employers to participate in the program, but does not interfere with the relationship between the business and those administering E-Verify. That was not the case in *Buckman*. In that case, indirectly imposing additional disclosure requirements on applicants to the FDA would interfere with the federal agency's procedures and ability to process applications for new medical devices. *Buckman,* 531 U.S. at 350-51.

Similarly, relying on *Buckman,* the United States argues broadly for the principle that "absent a clearer indication than is present here, federal statutes of this kind should not be understood to allow States to impose such burdens on federal programs." United States Br. 34. But the United States also concedes that Arizona's requirement does not burden the Department of Homeland Security. *Id.* And federal authorities have no cap on participation and no control over the volume of participation nationally. Moreover, the broad principle that the United States asserts contradicts conflict-preemption principles, which look for clear evidence that Congress intended to oust State authority, rather than for evidence that Congress intended to preserve State authority. *Medtronic,* 518 U.S. at 485.

The conflict-preemption analysis asks whether this law makes it impossible to comply with federal law or creates obstacles to achieving federal objectives. Arizona's law does not impede compliance with federal law and in fact helps to advance the federal

government's interest in ensuring a lawful workforce and developing an effective employee verification program. Therefore, Arizona's E-Verify requirement does not conflict with federal law and is not preempted.

CONCLUSION

For these reasons, this Court should affirm the court of appeals decision.

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ADDENDUM A

8 U.S.C. § 1373. Communication between Government agencies and the Immigration and Naturalization Service

(a) In general

Notwithstanding any other provision of Federal, State, or local law, a Federal, State, or local government entity or official may not prohibit, or in any way restrict, any government entity or official from sending to, or receiving from, the Immigration and Naturalization Service information regarding the citizenship or immigration status, lawful or unlawful, of any individual.

(b) Additional authority of government entities

Notwithstanding any other provision of Federal, State, or local law, no person or agency may prohibit, or in any way restrict, a Federal, State, or local government entity from doing any of the following with respect to information regarding the immigration status, lawful or unlawful, of any individual:

(1) Sending such information to, or requesting or receiving such information from, the Immigration and Naturalization Service.

(2) Maintaining such information.

(3) Exchanging such information with any other Federal, State, or local government entity.

(c) Obligation to respond to inquiries

The Immigration and Naturalization Service shall respond to an inquiry by a Federal, State, or local government agency, seeking to verify or ascertain the citizenship or immigration status of any individual within the jurisdiction of the agency for any purpose authorized by law, by providing the requested verification or status information.

ADDENDUM B

Arizona Rules of Civil Procedure, Rule 65.2. Action pursuant to A.R.S. § 23-212 or § 23-212.01

(a) Commencement of Action. An action brought by the county attorney pursuant to A.R.S. § 23-212 or § 23-212.01 shall be commenced by filing a verified complaint with the clerk of the superior court. The attorney signing the complaint shall verify that the attorney believes the assertions in the complaint to be true on the basis of a reasonably diligent inquiry.

(b) Contents of Complaint. A complaint filed under this Rule shall include the following:

(1) The name and address(es) of the employer;

(2) Specification of one or more business licenses subject to suspension or revocation under A.R.S. § 23-212 or § 23-212.01 that are held by the employer, and the identity and address of the licensing agency(ies), including the identity(ies) and mailing address(es) of the agency official(s) authorized to accept service under this Rule;

(3) A statement of specific facts alleged to show that one or more employees are unauthorized aliens;

(4) A statement of specific facts alleged to show that the employer intentionally or knowingly employed one or more unauthorized aliens; and

(5) In the case of an action for a second violation of A.R.S. § 23-212 or § 23-212.01, the case number of the first action and the date of the order or judgment

finding a first violation of A.R.S. § 23-212 or § 23-212.01. The complaint shall also include as an attachment a copy of the court's order or judgment finding a first violation of A.R.S. § 23-212 or § 23-212.01.

(c) Nature of Proceedings. An action brought pursuant to A.R.S. § 23-212 or § 23-212.01 shall be denominated as a civil action and assigned a specific subcategory code for purposes of case tracking. An action brought pursuant to A.R.S. § 23-212 or § 23-212.01 shall be heard and decided by the court sitting without a jury, except as otherwise permitted by Rule 39(m).

(d) Venue. An action brought pursuant to A.R.S. § 23-212 or § 23-212.01 shall be brought against the employer by the county attorney in the county where the unauthorized alien employee is or was employed by the employer. If the employee is or was employed by the employer in more than one county, the action shall be proper in any county in which the employee is or was employed by the employer.

(e) Expedited Proceedings. The court shall expedite an action brought pursuant to A.R.S. § 23-212 or § 23-212.01.

(f) Scheduling Conference. Simultaneously with the filing of the complaint required by subsection (a) of this Rule, the county attorney shall file an application and submit a form of order requesting the court to set a date for a scheduling conference to determine the schedule for expedited proceedings. A copy of the signed order shall be served on the employer and may

be served with the complaint. At the scheduling conference, the court may address the matters set forth in Rule 16(b) and may set such additional hearings as it deems necessary. On or before the date of the scheduling conference, the employer shall file and serve a written disclosure of the identity of all business licenses that it holds in this State.

(g) Evidentiary Hearing; Summary Judgment. The court may not order a license suspension or license revocation pursuant to A.R.S. § 23-212 or § 23-212.01 without first affording the parties the opportunity for an evidentiary hearing, unless all parties waive the hearing. Rule 56 shall not apply to these proceedings except upon the agreement of all parties.

(h) Standard of Proof. All factual issues required to be determined by the court shall be determined by a preponderance of the evidence.

(i) Applicability of Rules of Evidence. Except as provided in A.R.S. § 23-212(H) or § 23-212.01(H), the Arizona Rules of Evidence shall apply to proceedings under this Rule.

(j) Enforcement of Court Orders.

(1) After the entry of an order under A.R.S. § 23-212(F)(1) or § 23-212.01(F)(1) for a first violation, if an employer fails to file a timely sworn affidavit required by A.R.S. § 23-212(F)(1)(c) or § 23-212.01(F)(1)(d), the county attorney shall file an application for an order to show cause why the employer's licenses with the appropriate licensing agencies should not be

suspended beyond any period prescribed in any prior court order. The application shall be accompanied by an affidavit or other proof demonstrating that the employer has failed to file the required sworn affidavit and shall set forth the identity and address of any appropriate licensing agency, including the identity and mailing address of the agency official authorized to accept service under this Rule.

(2) Within five (5) days after service of an application for an order to show cause, the employer may file an opposition to the relief sought in the application and to any further license suspension on the ground that the employer has filed an affidavit meeting the requirements of A.R.S. § 23-212(F)(1)(c) or § 23-212.01(F)(1)(d). If such an opposition is timely filed, the court shall hold a hearing and shall not order any further license suspension until it renders its decision on whether to grant the relief sought in the application. If no opposition is timely filed or if the court grants the relief sought in the application, the court shall order the appropriate licensing agencies to suspend indefinitely all applicable licenses held by the employer.

(3) After the entry of an order suspending a license for a first violation for failure to file a required sworn affidavit, the employer may, by motion or stipulation, seek relief from the order on the ground that the employer has filed a sworn affidavit required by A.R.S § 23-212(F)(1)(c) or § 23-212.01(F)(1)(d). If such a showing is made and subject to the completion of any term of license suspension ordered under

A.R.S. § 23-212(F)(1)(d) or § 23-212.01(F)(1)(c), the court shall enter an order terminating any further license suspension.

(4) The clerk of the superior court shall distribute by any method authorized by Rule 58(e) a certified copy of any order suspending or revoking a license, or terminating a license suspension, entered under this Rule, or under A.R.S. § 23-212 or § 23-212.01, to the parties, the Arizona Attorney General, and any licensing agency ordered to suspend an employer's license.

(k) Action for Second Violation. An action alleging a second violation under A.R.S. § 23-212(F)(2) or § 23-212.01(F)(2) shall be filed and served as a new action.

(l) Requirement of Electronic or Facsimile Service. After a party has appeared in a proceeding brought under this Rule, any papers served on that party by mail under Rule 5(c) shall also be served at the same time by electronic mail or by facsimile, or as agreed to by the parties or ordered by the court. If the party on whom service is to be made does not have access to electronic mail or facsimile, then service shall be made as otherwise provided by Rule 5(c).

(m) Fees. The court shall assess such fees in these proceedings as may be prescribed by A.R.S. §§ 12-284, 12-284.01, and 12-284.02.

ADDENDUM C

UNITED STATES DISTRICT COURT,
D. ARIZONA

Nos. CV07-02496-PHX-NVW,
CV07-02518-PHX-NVW.

ARIZONA CONTRACTORS ASSOCIATION, INC., AN ARIZONA NONPROFIT CORPORATION; ARIZONA EMPLOYERS FOR IMMIGRATION REFORM, INC., AN ARIZONA NON-PROFIT CORPORATION; CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA, A WASHINGTON D.C. NON-PROFIT CORPORATION; ARIZONA CHAMBER OF COMMERCE, AN ARIZONA NON-PROFIT CORPORATION; ARIZONA HISPANIC CHAMBER OF COMMERCE, INC., AN ARIZONA NONPROFIT CORPORATION; ARIZONA FARM BUREAU FEDERATION, AN ARIZONA NON-PROFIT CORPORATION; ARIZONA RESTAURANT AND HOSPITALITY ASSOCIATION, AN ARIZONA NON-PROFIT CORPORATION; ASSOCIATED MINORITY CONTRACTORS OF AMERICA, AN ARIZONA NON-PROFIT LIMITED LIABILITY COMPANY; ARIZONA ROOFING CONTRACTORS ASSOCIATION, AN ARIZONA NON-PROFIT CORPORATION; NATIONAL ROOFING CONTRACTORS' ASSOCIATION, AN ILLINOIS NOT-FOR-PROFIT CORPORATION; WAKE UP ARIZONA! INC., AN ARIZONA NON-PROFIT CORPORATION; AND ARIZONA LANDSCAPE CONTRACTORS ASSOCIATION, INC., AN ARIZONA NON-PROFIT CORPORATION,

Plaintiffs,

v.

CRISS CANDELARIA, APACHE COUNTY ATTORNEY; ED RHEINHEIMER, COCHISE COUNTY ATTORNEY; TERENCE C. HANER, COCONINO COUNTY ATTORNEY; DAISY FLORES, GILA COUNTY ATTORNEY; KENNY ANGLE, GRAHAM COUNTY ATTORNEY; DEREK D. RAPIER, GREENLEE COUNTY ATTORNEY; MARTIN BRANNAN, LAPAZ COUNTY ATTORNEY; ANDREW P. THOMAS, MARICOPA COUNTY ATTORNEY; MATTHEW J. SMITH, MOHAVE COUNTY ATTORNEY; JAMES CURRIER, NAVAJO COUNTY ATTORNEY; BARBARA LAWALL, PIMA COUNTY ATTORNEY; JAMES P. WALSH, PINAL COUNTY ATTORNEY; GEORGE SILVA, SANTA CRUZ COUNTY ATTORNEY; SHEILA POLK, YAVAPAI COUNTY ATTORNEY; JON SMITH, YUMA COUNTY ATTORNEY; TERRY GODDARD, ATTORNEY GENERAL OF THE STATE OF ARIZONA; AND FIDELIS V. GARCIA, DIRECTOR OF THE ARIZONA REGISTRAR OF CONTRACTORS,

Defendants.

VALLE DEL SOL, INC.; CHICANOS POR LA CAUSA, INC.; AND SOMOS AMERICA,

Plaintiffs,

v.

TERRY GODDARD, IN HIS OFFICIAL CAPACITY AS ATTORNEY GENERAL OF THE STATE OF ARIZONA; GALE GARRIOTT, IN HIS OFFICIAL CAPACITY AS THE DIRECTOR OF THE ARIZONA DEPARTMENT OF REVENUE; AND ANDREW THOMAS, IN HIS OFFICIAL CAPACITY AS MARICOPA COUNTY ATTORNEY,

Defendants.

Feb. 19, 2008.

ORDER

NEIL V. WAKE, District Judge.

Plaintiffs have appealed the February 7, 2008 judgment dismissing Defendant Arizona Attorney General Terry Goddard without prejudice for lack of subject matter jurisdiction and entering judgment in favor of all other Defendants. They now seek an injunction preventing Defendants from implementing or enforcing the Legal Arizona Workers Act ("the Act"), A.R.S. §§ 23-211 through 214, for the duration of the appeal. Fed.R.Civ.P. 62(c). (Doc. 181, 182, and 183.) The court's findings of fact and conclusions of law (Doc. # 175) principally concluded: (1) that the Act is not expressly preempted by the Immigration Reform and Control Act of 1986 ("IRCA"), Pub.L. No. 99-603, 100 Stat. 3359 (employer sanctions provisions codified at 8 U.S.C. § 1324a to 1324c (2000)); (2) that the structure and purpose of IRCA do not clearly indicate Congressional intent to occupy the field of licensing sanctions for employers of unauthorized aliens; (3) that the Act does not regulate immigration; (4) that neither the licensing sanctions provisions of A.R.S. § 23-212, nor the requirement to use E-Verify found in A.R.S. § 23-214 conflicts with the purposes and objectives of Congress; (5) that the Act affords employers due process of law; and (6) that the Act

does not violate the Commerce Clause of the U.S. Constitution.

I. Standards for Injunction Pending an Appeal

An injunction pending appeal under Federal Rule of Civil Procedure 62(c) is an extraordinary remedy that should be granted sparingly. *Reading & Bates Petroleum Co. v. Musslewhite,* 14 F.3d 271, 275 (5th Cir.1994) ("Stays pending appeal constitute extraordinary relief."); *United States v. Texas,* 523 F.Supp. 703, 729 (E.D.Tex.1981) ("Since such an action interrupts the ordinary process of judicial review and postpones relief for the prevailing party at trial, the stay of an equitable order is an extraordinary device which should be sparingly granted.").

Four factors must be considered on Rule 62(c) motions: "(1) whether the stay applicant has made a strong showing that he is likely to succeed on the merits; (2) whether the applicant will be irreparably injured absent a stay; (3) whether issuance of the stay will substantially injure the other parties interested in the proceeding; and (4) where the public interest lies." *Hilton v. Braunskill,* 481 U.S. 770, 776, 107 S.Ct. 2113, 95 L.Ed.2d 724 (1987).

In general, to prevail on a motion for injunction pending appeal, the moving party must show either (1) "a strong likelihood of success on the merits" and "the possibility of irreparable injury to plaintiff if preliminary relief is not granted" or (2) "that serious legal questions are raised and that the balance of

hardships tips sharply in its favor." *Golden Gate Restaurant Ass'n. v. City of San Francisco,* No. 07-17370, ___ F.3d ___, 2008 WL 90078, at *2, 2008 U.S.App. LEXIS 364, at *4 (9th Cir. Jan.9, 2008) (quoting *Natural Res. Def. Council, Inc. v. Winter,* 502 F.3d 859, 862 (9th Cir.2007); *Lopez v. Heckler,* 713 F.2d 1432, 1435 (9th Cir.1983)). "These two formulations represent two points on a sliding scale in which the required degree of irreparable harm increases as the probability of success decreases." *Winter,* 502 F.3d at 862. Courts must "consider 'where the public interest lies' separately from and in addition to" the balance of hardships between the parties. *Id.* at 863.

All laws passed by State legislatures are entitled to a presumption of validity. That presumption is an equity to be considered in favor of the State when balancing hardships. *See Walters v. Nat'l Ass'n of Radiation Survivors,* 468 U.S. 1323, 1324, 105 S.Ct. 11, 82 L.Ed.2d 908 (1984) (Rehnquist, J., chambers). For that reason, in cases "in which 'the moving party seeks to stay governmental action taken in the public interest pursuant to a statutory or regulatory scheme,' the injunction should be granted only if the moving party meets the more rigorous likelihood-of-success standard." *Bery v. City of New York,* 97 F.3d 689, 694 (2d Cir.1996) (citing *Plaza Health Labs., Inc. v. Perales,* 878 F.2d 577, 580 (2d Cir.1989)); *Tunick v. Safir,* 209 F.3d 67, 70 (2d Cir.2000). *Cf. Golden Gate Restaurant Ass'n.,* 2008 WL 90078, at *13, 2008 U.S.App. LEXIS 364, at *37 (stating that to overcome

the public interest factor, it must be "obvious" that the law is invalid).

In this case an injunction is not needed to protect appellate jurisdiction and would upset the status quo.

II. Plaintiffs are Unlikely to Succeed in Invalidating the Act

Plaintiffs bear a heavy burden to invalidate the Act on appeal. They challenge the Act on its face, so they must prove that the Act cannot operate validly under any circumstance. To show that the federal government has occupied the field of licensing sanctions laws, Plaintiffs will have to overcome IRCA's preservation of state authority for employer sanctions by "licensing and similar laws." 8 U.S.C. § 1324a(h)(2).

Congress has extensive authority to destroy residual state police powers – to close the fifty laboratories of experiment. The protection of our federalism lies in Congress having to do so clearly and having to answer for it. "[T]he structural safeguards inherent in the normal legislative process operate to defend state interests from undue infringement." *Geier v. American Honda Motor Co.*, 529 U.S. 861, 907, 120 S.Ct. 1913, 146 L.Ed.2d 914 (Stevens, J., dissenting). But no one answers for it when, from special knowledge of purposes and proportionalities, the courts attribute preemption to Congress free of its own words that are plain enough to citizens. This would disarrange our federalism. It would require a bicameral majority to

restore state power, rather than leaving state power as our constitutional default position in the absence of a federal bicameral majority. Plaintiffs are unlikely to succeed in reading the express preservation of state licensing sanctions out of IRCA.

Plaintiffs' conflict preemption, due process, and dormant Commerce Clause arguments are even weaker. To some extent they attack the edges of the Arizona Act, not its core, on hypothetical facts not shown in this case. To that extent their attacks are directed at particular applications of the Act and are beyond this facial challenge. Further, if any single provision fails, the Act's severability clause will save the remainder, provided that the Act is not entirely preempted.

Plaintiffs do not have a probability of success on appeal, much less a strong probability. A mere "serious question" is not enough to suspend state action "taken in the public interest pursuant to a statutory . . . scheme." *Bery v. City of New York*, 97 F.3d at 694. This shortfall alone requires denial of the motions for injunction pending appeal.

III. The Balance of Hardships Favors Defendants

A. Plaintiffs' Hardship is Minimal

Plaintiffs' hardship comes down to nothing more than the expense of using E-Verify. If the federal government's statistics hold true for Arizona employers, 85% will spend less than $100 to set-up

E-Verify and 75% will spend less than $100 annually to operate the system. The average employer will likely spend $125 in set-up and $728 in maintenance of the system. (Joint Statement of Stipulated Facts ("Facts"), Doc. # 152, Ex. 52 at 104.)

The Act's E-Verify requirement is an increment to the already pervasive regulation of labor and employment in our society. A complaint that there is more cost to comply with labor regulation has little purchase. It is difficult to establish irreparable injury based on prospective monetary damages alone. *See Stop H-3 Ass'n v. Volpe,* 353 F.Supp. 14, 18 (D.Haw.1972) *rev'd on other grounds,* 533 F.2d 434 (9th Cir.1976) (citations omitted) ("Traditionally, the irreparable injury contemplated by Rule 62(c) is that which will make the appeal moot. Thus, prospective monetary damage is *not* irreparable injury."). While the cost of using E-Verify meets the minimum for standing, it is not so great as to warrant an injunction. *See Yniguez v. Mofford,* 730 F.Supp. 309, 317 (D.Ariz.1990) *rev'd on other grounds,* 939 F.2d 727 (9th Cir.1991) ("While Yniguez has established a sufficient threat of enforcement to provide an actual controversy for purposes of Article III and the Declaratory Judgment Act, she has not established an enforcement threat sufficient to warrant injunctive relief."); *Lawson v. Hill,* 368 F.3d 955, 959 (7th Cir.2004) ("Even if we are wrong to suppose the risk of prosecution too remote to confer standing to sue . . . the district judge was right not to enter an injunction. . . . [a]n injunction is an extraordinary remedy.").

Moreover, complying with E-Verify will have offsetting business benefits for Plaintiffs. It effectively ensures that they will be virtually immune from licensing sanction proceedings. *Arizona Contractors Ass'n v. Napolitano,* No. CV07-1355-PHX-NVW, ___ F.Supp.2d ___, 2007 WL 4293641, at * 11, 2007 U.S. Dist. LEXIS 90694, at * 34 (D.Ariz. Dec.7, 2007). Based upon past users' experiences, an overwhelming majority of Arizona employers will likely find E-Verify an effective and convenient tool for employment verification, (Facts, Doc. # 152, Ex. 52 at 140), and will rate the program "Excellent," "Very Good," or "Good" (Facts, Doc. # 149, Ex. 13 at 4).

Plaintiffs submit two declarations from Arizona employers who assert that they will have to spend much more than the usual amount to set up E-Verify. (Facts, Doc. # 150, Ex. 26 & 27.) Both are owners of franchise restaurants who allegedly will have to purchase computer equipment and dedicated Internet connections for each location to comply with E-Verify. One employer states that he will need to spend more than 82 times the national average to set up the system. Both declarations state bare conclusions. Neither displays any of the resourcefulness one expects from business people seeking efficient solutions to problems. The failure to explain and exclude other solutions leaves the court unpersuaded that either declaration states a likely true cost. Even if the declarations are taken at face value, their costs are minor compared to the cost to the State, others, and

to the public interest from suspending the Act, as explained below.

B. An Injunction Will Injure the Direct Financial Interests of the State

The State will suffer monetary damages from an injunction pending appeal. Its expenditure to inform every employer by October 1, 2007, of the Act and of the obligation to comply with E-Verify after December 31, 2007, will be wasted. 2007 Ariz. Sess. Laws, Ch. 279, § 3. (Facts, Doc. # 148, Ex. 6.) Giving individuals actual notice of the law, when it begins, and how to avoid risk by complying with E-Verify, was critical to the legislature's purpose of achieving effective deterrence with the fewest number of employers suffering actual sanctions. If the Act is suspended by court order, that legislative purpose of individual fairness will be defeated unless a new notice is sent in the event that the Act is allowed to go back into effect. Therefore, if an injunction were issued, the court would require Plaintiffs to post a bond under Rule 62(c) to cover the cost of a new notice.

IV. The Harm to the Public Interest from an Injunction Against Enforcement of the Act Would Greatly Outweigh Plaintiffs' Cost of Compliance

A. The Arizona Legislature Has Declared the Public Interest

The parties have submitted a number of expert reports and declarations concerning the effect of

immigration on the Arizona economy and wages. Significantly, Plaintiffs' studies do not distinguish between the effect of authorized and unauthorized immigration. Only Defendants' expert, Prof. George Borjas, offers a conservative estimate of the effect of unauthorized alien labor on authorized labor, both alien and citizen. For this and other reasons discussed below, the court finds Defendants' expert to be persuasive.

In any event, this is not an appropriate forum for second guessing the Arizona legislature's decision that the public interest is best served by strongly deterring the knowing or intentional employment of unauthorized aliens. This court's "consideration of the public interest is constrained in this case, for the responsible public officials in [the State] have already considered that interest." *Golden Gate Restaurant Ass'n.*, 2008 WL 90078, at *13, 2008 U.S.App. LEXIS 364, at *37. The Arizona legislature, like the federal government before it, balanced competing social and economic interests and decided in favor of an economy for those authorized to work in the United States. "[If it were obvious that the [Act] was unconstitutional or preempted by a duly enacted federal law[,]" there might be some basis to conclude that the public interest is not served by the Arizona legislature's preferred values. *Id.* However, one cannot by any stretch of reason describe the Act as obviously invalid. It is therefore in the public interest that this court exercise its "discretionary power with proper regard for the rightful independence of state governments in

carrying out their domestic policy." *Id.* (quoting *Burford v. Sun Oil Co.*, 319 U.S. 315, 318, 63 S.Ct. 1098, 87 L.Ed. 1424 (1943)). Declining an injunction pending appeal will allow the Act's continued application, and therefore will "in a real sense, preserve rather than change the status quo." *Id.* at *3, 2008 U.S.App. LEXIS 364, at *7, 2008 WL 90078.

B. By the Most Conservative of Measures, the Balance of Hardships Favors the Defendants and the Public Interest

In addition to noting the illegitimacy of disagreeing with the legislative body's preferred values, the court of appeals in *Golden Gate Restaurant Association* did assess the harm to the public and the beneficiaries of the challenged ordinance. *Id.* at * 13, 2008 U.S.App. LEXIS 364, 2008 WL 90078 at *35-37. Here also, the court is persuaded by Defendants' expert, Prof. George Borjas, that the number of unauthorized workers in Arizona is very substantial and that their presence in the work force drives down wages for competing authorized workers. For high school dropouts alone, wages are depressed by at least 4.7%, or about $950 annually. This exceeds $200 million per year just for those authorized workers. The numbers are far greater when including all authorized workers. (Facts, Doc # 150, Ex. 1 of Ex. 39 at 16.) Again, though these are gross estimates, Prof. Borjas has favored conservative figures.

Plaintiffs' experts are unpersuasive. Professor Marc R. Rosenblum, a political scientist and not an economist, offers general political arguments why employer sanctions have been ineffective and are a bad idea. While his historical narrative is helpful, his conclusions are not empirical science. Rather, they are speculations about the effects of the Arizona employer sanctions law, speculations which the legislature was not bound to accept. His conclusion that "[e]mployer sanctions depress wages for all U.S. workers" is not persuasive, and the court does not believe it. (Facts, Doc. # 150, Ex. 36 at 9.)

The conclusions of Judith K. Gans, also not an economist, about the general benefits of immigration do not address the effects of unauthorized alien labor upon those whom the legislature chose to protect. (Facts, Doc. # 150, Ex. 35.) The opinions of Prof. Giovanni Peri (Facts, Doc. # 150, Ex. 38) also do not persuasively undercut the opinions of Prof. Borjas (Doc. # 159, Borjas Aff.).

These expert reports include, and therefore inappropriately attempt to give weight to, the value of benefits produced by unauthorized alien labor. The benefits in fact to those who come to this country against the law to make better lives for themselves, to those who save from lower cost labor and general depression of wages from employing unauthorized aliens, and to those who enjoy the products of unauthorized labor at lower prices, do not count. The beneficiaries chosen identically by federal and Arizona law prevail over all who benefit from unauthorized

alien labor. They are the authorized workers in the United States who compete with unauthorized aliens. *See Incalza v. Fendi N. Am., Inc.*, 479 F.3d 1005, 1011 (9th Cir.2007) (quoting H.R. Rep. 99-682(I), at 46, *as reprinted in* 1986 U.S.C.C.A.N. at 5650) ("In passing IRCA, Congress wished to stop payments of wages to unauthorized workers, which act as a 'magnet . . . attract[ing] aliens here illegally,' and to prevent those workers from taking jobs that would otherwise go to citizens."). For these reasons, Plaintiffs' experts' conclusions are not helpful or persuasive in balancing the hardships.

The court finds as a fact that the cost of complying with E-Verify for Plaintiffs and all other Arizona employers is far less than the wage depression to the poorest Arizona workers from unauthorized alien labor. This effect on the public interest strongly weighs in favor of allowing the Act's continued implementation. Further, as persuasively detailed by Prof. Borjas, there are other and greater costs to workers from the large number of unauthorized alien workers in Arizona. An injunction would retreat from a status quo in which those with the least are getting a fairer chance at a small share of the prosperity of our Nation.

C. An Injunction Would Forfeit the Deterrence Already Achieved

There is good reason to think that the Act will significantly stem the increase and reduce the

absolute number of unauthorized alien workers in Arizona. It reduces employers' incentive to discriminate against foreign-appearing applicants, as E-Verify use assures that they are safe in retaining or terminating any new hire. Most frauds are easily caught. Unlike IRCA and the I-9 system alone, the Act apparently has a real deterrent effect. Unauthorized alien workers are more likely to cease their perjured claims of authorization if they think their efforts will fail. Employers may now accord the verification process more of the seriousness that Congress originally intended, and even identity theft may decrease as E-Verify includes photo identification.

Though no enforcement has begun yet, anecdotal accounts in the press indicate that pre-enforcement deterrence is occurring; unauthorized aliens are leaving and some wage levels may be increasing. Of course, anecdotes are not proof of systemic success-only the future can show that. But an injunction pending appeal would stop the future before it happens. It would forfeit the momentum of deterrence that the Act already has achieved.

D. The Public Interest Favors Learning the Effect of the Arizona Experiment Before Congress Considers Renewal of E-Verify in November 2008

Another factor in the public interest further disfavors an injunction in this case. Though the Act could survive without E-Verify, that mandatory verification system greatly aids the Act's economy and

effectiveness, and provides easy avoidance of liability. The Act directly serves the interests of Congress, which is to experiment with and refine the employment eligibility verification system. Unless extended, E-Verify's authorization will expire in November, 2008. Basic Pilot Program Extension and Expansion Act of 2003 ("Expansion Act"), Pub.L. No. 108-156, 117 Stat.1944 (note following 8 U.S.C. § 1324a (Supp.IV.2000)). Before then, Congress would benefit from the experience of Arizona employers under the Act.

V. CONCLUSION

Plaintiffs have shown neither a likelihood of success on the merits nor a balance of hardships in their favor. An injunction pending appeal is not warranted.

IT IS THEREFORE ORDERED that the motions for injunction pending appeal (Doc. 181, 182, and 183) are denied.

REPLY BRIEF

Supreme Court, U.S.
FILED
NOV 22 2010
OFFICE OF THE CLERK

No. 09-115

IN THE

Supreme Court of the United States

CHAMBER OF COMMERCE
OF THE UNITED STATES OF AMERICA *et al.*,
Petitioners,

v.

MICHAEL B. WHITING *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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1A William Meade Fletcher, *Fletcher Cyclopedia of the Law of Corporations* (2010) 5
2A Singer & Singer, *Sutherland Statutes and Statutory Construction* (7th ed. 2010) 8

OTHER AUTHORITIES

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REPLY BRIEF

There is no doubt, and Respondents raise none, that federal law centralizes authority for administering IRCA and IIRIRA exclusively in federal officials. Only federal officials may investigate and adjudicate violations of IRCA, impose civil and criminal penalties prescribed by IRCA, and manage the federal E-Verify system. 8 U.S.C. § 1324a(e); IIRIRA § 401. Federal law broadly preempts States from imposing "any" sanction "upon those who employ ... unauthorized aliens"; the single, limited role preserved for States is that, parenthetically, they may supplement them with "licensing" sanctions. 8 U.S.C. § 1324a(h)(2).

Respondents interpret IRCA as permitting them to "do indirectly what they could not do directly," *Int'l Paper* v. *Ouellette*, 479 U.S. 481, 495 (1987)—on their view, so long as ultimately they target something they label a "license," IRCA is satisfied. Resp. Br. 28-29. On this view, they may with impunity enact substantive regulations governing the hiring of aliens, gerrymander a definition of "licensing" unlike anything in Arizona law or elsewhere, and create a new system for investigating and adjudicating alleged violations that bears no resemblance to traditional licensing authority.

Arizona's interpretation would transform a narrow savings clause meant to preserve limited state authority into a gaping loophole. Whether one calls this hiding elephants in mouseholes, *Whitman* v. *Am. Trucking Ass'ns*, 531 U.S. 457, 468 (2001), exalting form over substance, *United States* v. *Eurodif*, 129 S. Ct. 878, 887 (2009), or simply ignoring Congress's intent, the result is the same: Whereas Congress crafted a comprehensive, balanced, and exclusively

federal system for verifying and enforcing employment status, 50 different States and every locality in the Nation now can enact their own shadow regimes under the guise of "licensing." Affirmance by this Court would bless the Balkanization currently underway, Business Organizations 10-20, contrary to Congress's clearly expressed intent.

Arizona's arguments about E-Verify are equally extraordinary. Although States cannot alter or administer the federal E-Verify program that Congress established as voluntary, Arizona orders employers to participate. The text of IIRIRA, however, demonstrates that Congress's intent was directly to the contrary. The decision of the Ninth Circuit should be reversed.

I. THE UNAUTHORIZED-WORKER PROVISIONS OF THE ARIZONA ACT ARE PREEMPTED.

A. The Unauthorized-Worker Provisions Are Expressly Preempted.

IRCA establishes a "comprehensive" and "uniform[ ]" federal scheme that regulates the employment of aliens. *Hoffman Plastic Compounds* v. *NLRB*, 535 U.S. 137, 147 (2002); IRCA § 115. Congress forbade States and localities from imposing sanctions "upon those who employ ... unauthorized aliens," 8 U.S.C. § 1324a(h)(2), using the intensifier "any" to emphasize its broadly preemptive intent, see *Ali* v. *Fed. Bureau of Prisons*, 552 U.S. 214, 219 (2008). It remains undisputed that, unless Arizona's unauthorized-worker provisions are saved from preemption, they fall within this express prohibition; the only question is whether the Arizona provisions are "licensing [or] similar laws." 8 U.S.C.

§ 1324a(h)(2). They are not. The independent regulatory system enacted by Arizona cannot reasonably be described as "licensing." Pet. Br. 20-37; U.S. Br. 10-26. Under IRCA, "licensing" laws are those that impose traditional "licensing" sanctions, Pet. Br. 24-28; *infra* 3-8, and nothing in IRCA authorizes States and localities independently to adjudicate unauthorized-worker violations, Pet. Br. 28-34; *infra* 9-12.

1. Before addressing these fundamental defects, we begin where Arizona does—with *De Canas* v. *Bica*, 424 U.S. 351 (1976). Arizona cites *De Canas* and other pre-IRCA decisions as proof that state statutes that "touch on immigration issues are not per se preempted." Resp. Br. 27. This is true, but irrelevant. The question here is whether state statutes imposing sanctions *for employing unauthorized aliens* (not those that "touch on immigration") are preempted *by IRCA*. *De Canas*, a pre-IRCA decision, does not answer this question.

To the extent *De Canas* is instructive, it favors Petitioners. *De Canas* rejected a field preemption argument because Congress in the Farm Labor Contractor Registration Act expressly preserved state authority to "regulate the employment of illegal aliens." 424 U.S. at 361; *Toll* v. *Moreno*, 458 U.S. 1, 13 n.18 (1982). IRCA took the opposite approach, expressly preempting States from regulating employment of illegal aliens. 8 U.S.C. § 1324a(h)(2). And, Congress amended the statute upon which *De Canas* relied to conform and subordinate it to IRCA's comprehensive scheme. IRCA § 101(b); see Pet. Br. 32-34; Mazzoli 7-8.

2a. A "licensing or similar law" is a registration or permitting process that conditions the right to engage in a business—such as farm labor contracting, a focus

of Congress's attention—on fitness to engage in that business. Pet. Br. 24-28; U.S. Br. 10-16. This interpretation accords with the common understanding of the term "licensing," standard usage in other federal statutes, and the structure and history of IRCA. Pet. Br. 24-26. It is how Arizona uses the term when drafting legislation, *id.* at 28, and how the term is used in the laws of Arizona, *id.*, and its *amicus* Missouri, see States A1-A52.

The Arizona Act is both under- and over-inclusive, strong evidence that this is not licensing in any traditional sense. It exempts professional licenses, Pet. Br. 22, which Arizona makes no effort to explain. (Its *amici* suggest that "[p]rofessionals ... are unlikely to personally employ 'un-authorized aliens.'" States 13. But cf. Michael J. Sniffen, *Nominees Sunk by Tax and Nanny Problems for Years*, AP, Jan. 14, 2009.) Yet the Act *does* authorize the revocation of foundational corporate documents that are not commonly called or treated as "licenses," such as articles of incorporation. Arizona justifies this on the theory that a "license" under IRCA encompasses *any* State-granted right that relates to business authorization and that the State calls a "license." Resp. Br. 31-33. This is the same boundless definition embraced by the Ninth Circuit, and it finds no support in IRCA's language or history. Pet. Br. 21.

It certainly does not reflect the term's "plain meaning." Resp. Br. 31. The dictionaries Arizona quotes (like those on which Petitioners and the United States rely, Pet. Br. 26-27; U.S. Br. 15) define a "license" as "permission ... to engage in some business or occupation." Resp. Br. 31 (quoting *Webster's Third New International Dictionary* 1304 (1993)). A "license" thus regulates *conduct* ("to engage") in a trade

("some business or occupation"). Pet. Br. 26-28. Articles of incorporation or partnership do not grant permission to engage in a particular trade or activity; they are general legal recognition of a company's existence. 1A *Fletcher Cyclopedia of the Law of Corporations* § 161 (2010); U.S. Br. 8-9, 15. Revoking articles of incorporation therefore denies the company the right to *exist*; a company whose license to engage in a particular business has been revoked remains able to engage in other activities, including other business. Unlike a corporation whose articles of incorporation are suspended or revoked, it does not lose the ability to own property, maintain limited liability, or fulfill duties owed to shareholders. Arizona responds that revoking a corporation's articles of incorporation is like revoking a true business license because as a practical matter a dissolved corporation cannot conduct business, Resp. Br. 32-33, and both consequences are severe, *id.* at 36. The same would be true of deporting or executing a business owner, but no one calls this "licensing."[1]

Arizona errs when it characterizes our argument as a quibble "about the organization of Arizona's State

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[1] Arizona's *amici* misunderstand Petitioners' position as limiting "licensing" to permission to engage in a "profession." States 3. Although professional licensure fits comfortably within the ordinary meaning of "licensing," so also do fitness-to-do-business laws governing businesses other than professions. Pet. Br. 27-28 (citing statutes governing firearms dealers and foreign air carriers).

Unlike statutes such as 8 U.S.C. § 1621(c), which defines "state and local public benefit[s]" to include "professional and commercial licenses," *see* Resp. Br. 33, IRCA regulates *employers*, which is all the more reason to think that Congress had in mind fitness to do business.

code." *Id.* at 35. The question is not whether Arizona should codify license-revocation authority all at once or separately in each "section[ ] in which the State's power to issue those licenses is specified." *Id.* Rather, the question is a substantive one—whether Congress would have thought that creating new state machinery for adjudicating a new state-law offense of hiring an unauthorized alien is "licensing." Arizona identifies no statute that defines "license" in this fashion. It relies (at 33) on cases that do not consider the meaning of the term "license," *e.g.*, *Bendix Autolite* v. *Midwesco Enters.*, 486 U.S. 888, 894 (1988), and even the provisions that those cases note in passing are substantially more limited than the Act—they deal with registration for out-of-state corporations to engage in particular conduct within the State, typically based on proof of good standing in the corporation's home State. *E.g.*, *id.* at 892 n.2; see, *e.g.*, Ohio Rev. Code § 1703.04(A)(3). In the federal statutes referred to by Arizona that actually address licensing, Resp. Br. 33, the term is never used in the broad sense that Arizona urges; those statutes concern instruments commonly thought of as licenses, such as professional and driver's licenses.

Arizona is left to defend its capacious interpretation of "licensing" on the theory that Congress intended "a full range of sanctions [to be] available." *Id.* at 37. But, Arizona never explains what a "full range" is, or provides any authority that Congress intended this at all, much less that States be the ones to impose the "full panoply." *Id.* at 29. This is with good reason—there is no evidence in IRCA of such an intent. Rather, Congress limited and calibrated the penalties that may be imposed for unauthorized-worker violations, and broadly preempted all other "civil or crimi-

nal sanctions." Pet. Br. 4-8; see AAJC 12-14; Business Organizations 6-10; Mazzoli 7-8; NIJC 7-25.[2]

b. IRCA's structure and history confirm that the savings clause is meant to preserve "'fitness-to-do-business laws,' such as state farm labor contractor laws," H.R. Rep. No. 99-682(I), at 58 (1986), which is what Congress had in mind. Pet. Br. 25-26; U.S. Br. 19-22. IRCA's preemption provision and savings clause built upon the registration scheme contained in AWPA. *Id.* That statute required businesses to obtain registration certificates before engaging in "farm labor contracting activity," and expressly permitted States to enact separate systems for registering farm labor contractors. 29 U.S.C. §§ 1802, 1811, 1816(a), 1871 (1985); see *De Canas*, 424 U.S. at 361 (discussing AWPA's predecessor statute). When IRCA was enacted, approximately 12 States had such laws, which typically did not independently prohibit (or adjudicate) hiring unauthorized workers, Pet. Br. 25 & n.13, and the savings clause was drafted with preserving these particular licensing laws in mind. This is evidenced by, among other things, IRCA's conforming amendments to AWPA. IRCA § 101(b); H.R. Rep. No. 99-682(I), at 58.

Arizona does not substantively address AWPA, and offers no explanation of these amendments. It derides this "evidence" as "thin," and mere "legislative

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[2] Nor is Arizona's broad standard necessary to avoid a claimed Tenth Amendment problem. Resp. Br. 37; States 4-6, 13. There is no hint here of "commandeer[ing]" state resources, *New York* v. *United States*, 505 U.S. 144, 161 (1992), and the Tenth Amendment poses no barrier to federal legislation otherwise within Congress's constitutional power, *Garcia* v. *San Antonio Metro. Transit Auth.*, 469 U.S. 528, 537-48 (1985).

history," Resp. Br. 41, but it is neither. IRCA's conforming amendments to AWPA are law, and statutory interpretation is properly informed by the structure and history of the whole act. *MCI Telecomms.* v. *AT&T*, 512 U.S. 218, 226 (1994); 2A *Sutherland Statutes and Statutory Construction* § 46:5 (7th ed. 2010). That principle has particular force here, given the explicit link between IRCA and AWPA. Pet. Br. 32-34.

c. With little support for its boundless claim of authority to regulate employment-authorization status, Arizona resorts to the "presumption against preemption." Resp. Br. 34-38. It says its construction must be accepted because "when the text of a pre-emption clause is susceptible of more than one plausible reading, courts ordinarily 'accept the reading that disfavors pre-emption.'" *Id.* Even if the presumption did apply, but cf. U.S. Br. 25-26, Arizona and the Ninth Circuit fail to give the savings clause *any* real effect; on their theory, a State need only label its sanctions "licensing" to evade preemption. South Carolina has ably demonstrated the emptiness of such a requirement. S.C. Code Ann. §§ 41-8-20(A), 41-8-50(D)(2)-(4); see Pet. Br. 23. Arizona's interpretation conflicts with the common understanding of the term "licensing," and is demonstrably inconsistent with the statute's structure and history, *supra* 3-8—including the balance that Congress struck by prohibiting illegal hiring, while minimizing burdens on employers, and preventing discrimination. Pet. Br. 42-46; see *Riegel* v. *Medtronic*, 552 U.S. 312, 325 (2008) (rejecting interpretation of preemption provision that would allow state laws to "disrupt[ ] the federal scheme"). Arizona's interpretation would let States directly regulate employment-status verification, contrary to every statutory indication that Con-

gress meant to prohibit precisely this outcome. To apply the presumption against preemption in the fashion that Arizona advocates would be to nullify Congress's intent.

3a. The Arizona Act also is preempted because IRCA's reference to "licensing" laws does not confer upon States the authority to adjudicate unauthorized-worker violations. Pet. Br. 28-34. According to Arizona, IRCA's savings clause permits it to establish and enforce its own unauthorized-worker prohibitions. Resp. Br. 36. This interpretation finds no support in the statutory language. The savings clause allows for the imposition of "sanctions" under limited circumstances. 8 U.S.C. § 1324a(h)(2). Nothing on its face authorizes States to craft and enforce new regulatory systems aimed at governing employment-authorization status.

Arizona therefore has matters backwards when it argues that States are not forbidden from establishing new mechanisms for investigating and adjudicating immigration-status violations because, it says, "[t]he savings clause itself ... says nothing." Resp. Br. 36, 47. But it is plain—and Arizona does not dispute—that without the savings clause, the unauthorized-worker provisions of the Arizona Act fall within IRCA's broad preemption of "sanctions ... upon those who employ ... unauthorized aliens." Pet. Br. 20-21. The relevant question, therefore, is not whether IRCA preempts the Arizona provisions in the first instance—it does—but whether it expressly *preserves* them from preemption. If, as Arizona asserts, the savings clause is "silent" about whether States may create new substantive prohibitions against hiring unauthorized workers,

and regulatory machinery for enforcing that prohibition, such "silence" demands preemption. Indeed, Arizona's sweeping enactment looks nothing like traditional licensing authority, which may require licensees to comply with specified laws, but would not typically attempt to adjudicate violations of those laws—particularly when those laws are outside the licensor's core competence. *Id.* at 31-32 & n.19. Arizona makes no argument to the contrary, nor offers a single counterexample to validate its approach.

Interpreting the savings clause as granting States authority to enact unauthorized-worker prohibitions would be inconsistent with IRCA's enforcement provisions. IRCA vests exclusive investigatory and adjudicatory authority in federal officials. *Id.* at 29-30; U.S. Br. 23-26. Nothing in IRCA conceives of these procedures as "licensing," and nothing in IRCA suggests that States may supplement or supplant IRCA's federal regulatory and enforcement scheme. The reason the savings clause itself "says nothing" about state investigation and adjudication, Resp. Br. 36, is that IRCA already denies them any such role.

b. IRCA's history confirms that Congress did not intend to authorize States to undertake their own adjudication of unauthorized-worker violations in the guise of business "licensing."

First, at the same time IRCA created a substantive prohibition and an enforcement system, it eliminated even other *federal* authority to regulate work-authorization status. IRCA repealed similar provisions in AWPA, see IRCA § 101(b), which had been actively enforced by the Department of Labor, see Pet. Br. 29-33; SEIU 11-16. Having determined that IRCA should be the sole enforcement mechanism for

unauthorized-worker violations, Congress cannot have intended to invite 50 States and thousands of localities to proliferate disuniformity in this fashion.

Second, this interpretation is supported by the key committee report, which points to "state farm labor contractor laws" under AWPA—confirming the limited purpose of the exception. The savings clause preserves state laws "concerning the suspension, revocation, or refusal to reissue a license to any person who has been found to have violated the sanctions provisions *of this legislation*." H.R. Rep. No. 99-682(I), at 58 (emphasis added). Thus, when there has been a violation *of IRCA*, States may sanction licensees for "hiring, recruiting or referring undocumented aliens." *Id.* Far from "ambiguous," Resp. Br. 42-43, this makes clear that the savings clause empowers States only to tack on "licensing" sanctions following an adjudicated violation of federal law. Pet. Br. 34; U.S. Br. 19-20. Arizona does not purport to adjudicate violations of IRCA, and does not argue that it could; it would circumvent this difficulty through the artifice of creating new state-law prohibitions "modeled after IRCA." Resp. Br. 1.

Third, this interpretation is confirmed by the two sets of state laws that existed at the time of IRCA's passage and that provide the context for Congress's action. Pet. Br. 25-31 & nn.13, 16. One set, which Congress meant to preserve, provided for sanctions against registration certificates held by farm labor contractors, and typically did not undertake independent adjudication of a federal-law violation. *Id.* The other laws (like the one at issue in *De Canas*), which Congress was aware of and meant to preempt, independently prohibited the employment of unauthorized workers, and in many cases created separate

enforcement and sanctions systems. *Id.*; Mazzoli 5-8; *supra* 7. Arizona does not contest Petitioners' showing that Congress intended to preserve some of these laws and preempt others; it simply does not respond.

Far from "untenable," Resp. Br. 37, therefore, it is faithful to IRCA's text, structure, and history to interpret IRCA as preempting States from independently adjudicating unauthorized-worker violations. The contrary interpretation advanced by Arizona would undermine the "uniform[ity]" of the federal system.

4. In the end, nothing about the Arizona Act resembles "licensing." Pet. Br. 34-36. The Act does not regulate permission or fitness to do business; it does not provide for the issuance of any registration or certification[3]; and its operation is wholly divorced from any supervisory board or traditional licensing authority. Finally, it imposes penalties, ranging from injunctions to corporate dissolution, that do not relate in any way to a "license." Pet. Br. 34-36. Instead, in both form and effect, the Act is substantive immigration regulation. Indeed, the first sentence of the response brief acknowledges that Arizona's purpose is "to ensure that workers who are hired by Arizona employers are legally authorized to work in this country." Resp. Br. 1. Arizona's *amici* are even more explicit—because of what they perceive as federal inaction to "secure the border," ACLJ 10, and their dis-

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[3] Arizona's argument that a "licensing" law need not address "issuance" of licenses misses the point. Resp. Br. 35. Even if issuance procedures are not *necessary* to constitute "licensing," they are without doubt a typical and important component of it, Pet. Br. 34-36, and their absence here is powerful evidence of the true nature of Arizona's statutory regime.

agreement with federal enforcement priorities, American Unity 2-3, they say that IRCA should be interpreted to authorize action by States and localities. But a statute is not "a nose of wax to be changed from that which the plain language imports," *Yu Cong Eng* v. *Trinidad*, 271 U.S. 500, 518 (1926), and the word "licensing" does not authorize every State and locality in the country to enact substantive immigration policies and procedures.

B. The Unauthorized-Worker Provisions Are Impliedly Preempted.

The unauthorized-worker provisions of the Arizona Act also are impliedly preempted. They establish a shadow regulatory system that is inconsistent with IRCA's "comprehensive" regime, and they disrupt the careful balance struck by Congress. Pet. Br. 37-47; U.S. Br. 23-26.[4]

1. IRCA centralizes investigatory and adjudicatory power in the federal government. The statute di-

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[4] Arizona suggests (at 44) that the existence of the savings clause imposes some heightened burden to show preemption. On the contrary, an express preemption provision or savings clause does not "bar the ordinary working of conflict pre-emption principles." Pet. Br. 37 (citing cases).

Similarly, two of Arizona's *amici* ask for a "high[er] burden of proof" because this is a facial challenge. Eagle Forum 11-12; Pearce 9-11. But they identify no factual record that could or should be developed. This case presents a facial conflict between provisions of federal and state law, of a type this Court routinely decides. *E.g.*, *Chamber of Commerce* v. *Brown*, 554 U.S. 60, 66-69 (2008); *Cal. Coastal Comm'n* v. *Granite Rock*, 480 U.S. 572, 579-80 (1987). It depends on no "speculation" about enforcement. *Cf. Wash. State Grange* v. *Wash. State Republican Party*, 552 U.S. 442, 450, 454-55 (2008).

rects the U.S. Attorney General to define the individuals "authorized" to be employed, vests "authority in investigations" in federal officials, requires hearings to be conducted before federal ALJs, and provides for review in the federal courts of appeals. 8 U.S.C. § 1324a(e); see Pet. Br. 37-42; U.S. Br. 23-25. The result is a comprehensive federal system that depends on specialized federal expertise. NIJC 9-25. There is no role for States in this federal process, and Arizona does not contend otherwise. Instead, it argues, it can enforce a similar prohibition if reenacted under state law. Resp. Br. 44-53. Specifically, it asserts that the investigation and adjudication provisions of the Arizona Act "are reasonable measures to implement sanctions that are within IRCA's savings clause," and that they "careful[ly] incorporat[e] ... federal laws and standards." *Id.* at 44, 52. Neither assertion is correct.

a. Even were it true that Arizona's new system for investigating and adjudicating unauthorized-worker violations constitutes "licensing," the enactment of such a system conflicts with Congress's decision to centralize enforcement in a single federal regulatory structure. Arizona's presupposition that it may implement whatever procedures it wishes, in order to impose sanctions, turns preemption on its head—Arizona cannot use methods that conflict with Congress's. *Riegel*, 552 U.S. at 325. Nor has it ever been thought *necessary* to enact a regulatory structure like this to impose licensing sanctions; on the contrary, a licensing authority would not typically have the expertise or resources to independently adjudicate whether the prospective licensee violated the law of another jurisdiction, but instead would take notice of a previously adjudicated violation. Pet. Br. 31-32.

Arizona argues that "matters left unaddressed [in a federal regulatory scheme] are presumably subject to state law" and "[t]he mere existence of a federal regulatory or enforcement scheme ... does not by itself imply pre-emption of state remedies." Resp. Br. 47. But the process for investigating and adjudicating unauthorized-worker violations is not "unaddressed" in IRCA. IRCA defines that process in detail, and vests authority over those procedures in federal officials. *Supra* 13-14; Pet. Br. 37-47; U.S. Br. 23-25. Nor is the question of remedies "unaddressed"; the scope of permissible state and local remedies is the very purpose of the preemption provision. It is bizarre to think that Congress, having left no room for States and localities to adjudicate IRCA violations, meant to permit every last town council to create new mechanisms to adjudicate newly created substantive immigration prohibitions.

Arizona also analogizes its Act to a state court exercising jurisdiction over a federal claim. Resp. Br. 48. But, that is not what is at issue here, and even Arizona does not argue that it is granted enforcement authority *under IRCA*. However appropriate state activity may sometimes be under a "decentralized scheme that preserves a broad role for state regulation," *Bates* v. *Dow Agrosciences*, 544 U.S. 431, 450 (2005), IRCA takes the opposite approach. There is no evidence that Congress was concerned with preserving state "prosecutorial discretion," Resp. Br. 52, a suggestion flatly at odds with Congress's conclusion that authority for investigating and adjudicating unauthorized-worker violations should be vested in expert federal agencies. It is not "merely ... the comprehensive character" of the federal system that compels preemption, *id.* at 47, but the clear evidence that "Congress intended to centralize all authority over

the regulated area in one decisionmaker: the Federal Government." *Freightliner* v. *Myrick*, 514 U.S. 280, 286 (1995).

b. Arizona further argues that its scheme is not preempted because it "incorporat[es] ... federal laws and standards." Resp. Br. 44. *First*, its expansive theory depends on no such limitation—it argues elsewhere that "no federal law requires" it to employ federal procedures. *Id.* at 48.

Second, Arizona's procedures conflict markedly with federal law. Pet. Br. 39-42; U.S. Br. 23-25. The Act directs county officials to obtain information regarding work-authorization status from federal officials pursuant to 8 U.S.C. § 1373(c), but § 1373(c) on its face provides for disclosure of something different—"immigration status." Pet. Br. 41-42. Arizona responds that sometimes the information provided under § 1373(c) might suffice, Resp. Br. 50 n.10, but this only confirms the incoherence of the Arizona scheme. Moreover, Arizona's Act empowers state courts to treat this federal "determination" as a mere "rebuttable presumption." Ariz. Rev. Stat. §§ 23-212(H)-(I), 23-212.01(H)-(I); see Pet. Br. 40; U.S. Br. 23-24. Nothing in the statute says this provision is only for the benefit of employers, Resp. Br. 49; but, whatever the rationale for this provision, the fact remains that it permits a state official to ignore the federal immigration system.

In further conflict with federal law, the Act asks employers to offer proof of compliance with E-Verify and I-9 procedures, but federal law explicitly precludes the use of such information for purposes other than compliance with federal law. Pet. Br. 42; U.S. Br. 24-25. Arizona responds that this prohibition binds only the federal government. Resp. Br. 50-51.

On the contrary, the provisions limit copying documentation for *any* purpose other than complying with IRCA, 8 U.S.C. § 1324a(b)(4), and prohibit use of the federal forms for any purpose other than enforcing designated federal criminal laws, *id.* § 1324a(b)(5). See 8 C.F.R. § 274a.2(b)(4); U.S. Dep't of Homeland Security, E-Verify Program Mem. of Understanding § II.C.13 (Sept. 2009) (JA 420-21). These express limitations on the use of such information confirm that Congress cannot have intended state adjudications like those Arizona proposes to undertake.

Third, even if Arizona's provisions did mirror IRCA, this would not save the Act. The "uniform[ity]" IRCA was designed to achieve encompasses not only standards for assessing work-authorization status and violations, but also their *application*—which Congress ensured by centralizing decision-making authority in federal officials. Pet. Br. 37-42; U.S. Br. 23-25. There is no reason to believe, and Arizona offers none, that Congress intended that States and localities—although precluded from enforcing IRCA itself—could nevertheless re-enact and enforce similar provisions as state or local law, much less to authorize them to disregard the findings of federal immigration authorities.

2. Perhaps most fundamentally, the Arizona Act badly disrupts the balance struck by Congress. Pet. Br. 42-47; U.S. Br. 25-26. Arizona does not dispute the extraordinary legislative effort that resulted in IRCA. Pet. Br. 3-4, 42-45; Business Organizations 5-10; Mazzoli 5-11. Nor does it dispute that IRCA reflects Congress's careful weighing of different interests—deterring illegal immigration, preventing unlawful discrimination, avoiding undue burdens on

employers, and protecting privacy (although Arizona's ardent *amici* do contend that Congress cared only about enforcement, *e.g.*, American Unity 15-16, 21).[5] Pet. Br. 6-8, 42-44; AAJC 12-14.

Rather, Arizona suggests, it "need not attempt to further all of the interests that Congress considered." Resp. Br. 53. If Arizona means to argue that disrupting a balance struck by Congress is no basis for preemption, see *id.* (no preemption unless "actual conflict"), then it is wrong as a matter of law. The disruption of Congress's careful efforts is ample basis for preemption when, as here, Congress considered the push and pull of various interests and decided upon a particular balance to achieve its goals. *Geier* v. *Am. Honda Motor*, 529 U.S. 861, 881-83 (2000); *Ouellette*, 479 U.S. at 494-96; Pet. Br. 42-46.

Importantly, Arizona never disputes that it has altered Congress's balance by elevating enforcement above all other considerations. Nor could it, given its past statements. See Pet. Br. 45. Instead, Arizona responds that it did not *entirely* ignore the other concerns that motivated Congress. Resp. Br. 53-56. Its discussion of those other concerns, however, only underscores how little attention Arizona gave them. For instance, Congress was deeply concerned about

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[5] Congress's sober consideration of these issues stands in contrast to the fulminations of Arizona's *amici*. Their suggestion that this case is about guaranteeing a flow of cheap labor, *e.g.*, NumbersUSA 27, or protecting "scofflaw employers," Pearce 3, is uninformed and unwarranted. The Chamber of Commerce, for instance, has been outspoken in promoting a legal workforce. The unfounded nature of these accusations is confirmed by the array of civil rights groups, unions, immigration attorneys and members of Congress aligned here, who surely are not motivated by a desire for illegal labor.

burdening employers, both out of concern for employers themselves, and for fear of discrimination that might result. Pet. Br. 42-44; Business Organizations 8-10; AAJC 12-14; NIJC 8-9. Arizona does not dispute that allowing every State and locality to enact regulatory systems governing unauthorized workers would create a massive burden on employers. It asserts only that the Arizona system contains "judicial proceeding[s]" meant to benefit employers, Resp. Br. 54-55, and that the Act gives local officials slightly less investigatory authority than they might otherwise have, *id.*—as though such litigation and investigation are not themselves immensely burdensome.

Ultimately, Arizona's contention is that by authorizing States to impose licensing sanctions, Congress itself disrupted the balance it otherwise intended to create. Resp. Br. 25, 55-56. To state this proposition is to refute it. In IRCA, Congress carefully calibrated sanctions, including by precisely offsetting unauthorized-worker sanctions with anti-discrimination penalties. Pet. Br. 6-8, 42-44. It broadly preempted all further sanctions, with a narrow carve-out for certain state licensing authority. That statutory structure provides no basis to conclude that Congress acted in self-negating fashion. On the contrary, the need for the licensing proviso to coexist with Congress's balancing is precisely why the term "licensing" must be given a sensibly limited interpretation, so that the provision does not "destroy itself." *AT&T* v. *Cent. Office Tel.*, 524 U.S. 214, 228 (1998); *supra* 6-7.[6]

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[6] Some of Arizona's *amici* (but not Arizona) similarly point to 8 U.S.C. § 1324, as evidence that Congress had a "single-minded focus on enforcement and punishment." *E.g.*, American Unity 21, 25-28 (quotations omitted). But § 1324 criminalizes "bring-

Arizona goes on to assert that States sometimes may regulate in areas touching immigration. Resp. Br. 56-57. To be sure, but this does not mean States may regulate *here*. In the instances Arizona identifies, federal law explicitly authorized State participation, *e.g.*, 8 U.S.C. § 1611, or broadly preserved State authority in the field, *e.g.*, *De Canas*, 424 U.S. at 360-61; cf. *Toll*, 458 U.S. at 13 n.18. Here, in contrast, federal law addresses the very subject Arizona wishes to regulate, and reflects a careful and comprehensive approach that would be disrupted by competing state regimes. Recognizing the preemptive effect of federal law in this context would not "rewrite IRCA's savings clause," Resp. Br. 58—it would preserve the true licensing sanctions Congress contemplated, while giving effect to the remainder of Congress's enactment. Arizona and its *amici* may disagree with the balance Congress struck, but Arizona must respect federal law. Because the Arizona Act "exert[s] an extraneous pull on the scheme established by Congress," *Buckman* v. *Plaintiffs' Legal Comm.*, 531 U.S. 341, 353 (2001), it is preempted.

II. ARIZONA'S E-VERIFY MANDATE IS IMPLIEDLY PREEMPTED.

Arizona's E-Verify mandate also is preempted. Pet. Br. 47-51; U.S. Br. 26-34. E-Verify is explicitly and repeatedly defined as "voluntary," and the federal official authorized to administer it is expressly prohibited from "requir[ing] any person or other entity to participate." IIRIRA § 402(a).

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ing in" and "harboring" aliens, not the bare employment of unauthorized workers. *See Sys. Mgmt.* v. *Loiselle*, 91 F. Supp. 2d 401, 408 (D. Mass. 2000) (contrasting §§ 1324 and 1324a).

Arizona offers no reason to think States can modify this federal program. It acknowledges that E-Verify was established as a "pilot" program, to test as a possible alternative to the I-9 process, and that Congress repeatedly declined to make E-Verify mandatory. Nevertheless, it argues, it is not "impossible" for parties to comply with both the Act and IIRIRA. Resp. Br. 58-59. But impossibility is not the only form of implied preemption; a state law is preempted when it "conflicts" with federal law. *Geier*, 529 U.S. at 869-72; *Buckman*, 531 U.S. at 348-51; U.S. Br. 27. The conflict here could not be more stark: Arizona makes E-Verify mandatory, while federal law gives employers the "voluntary" choice to "elect" to participate. IIRIRA § 402(a). The Arizona Act is thus preempted, even if an employer could theoretically comply with both. *Adams Fruit* v. *Barrett*, 494 U.S. 638, 649-50 (1996) (state law that denies right accorded under federal law is preempted); *Wyeth* v. *Levine*, 129 S. Ct. 1187, 1210-11 (2009) (Thomas, J., concurring in judgment) (same).

Arizona seeks to distinguish *Geier* and *Buckman*, Resp. Br. 64-66, which found preemption in analogous circumstances. But *Geier* was not only about "giving 'more time [to] manufacturers'" or the functioning of the "private marketplace," *id.*; it found preemption when, as here, state law intruded on a deliberate federal decision to provide a voluntary choice among an array of options. 529 U.S. at 878. Similarly, *Buckman* was not just about the State "interfer[ing] with the relationship between" the agency and regulated party, Resp. Br. 65-66, but also about the State imposing unwarranted burdens on a federal

system—as Arizona would do here. 531 U.S. at 347-50.[7]

Arizona argues that mandatory E-Verify poses no "obstacle" because Congress's goal "was not to establish a voluntary employee verification system, but to develop an effective one." Resp. Br. 60. But, even if so, "[t]he fact of a common end hardly neutralizes conflicting means." *Crosby* v. *NFTC*, 530 U.S. 363, 379 (2000). Congress made E-Verify voluntary in order to assess its acceptance in the business community, by measuring employer participation. Pet. Br. 47-51; U.S. Br. 26-34. This objective would be thwarted if States mandated participation: Congress would be denied the data by which to assess E-Verify's acceptance and feasibility.

Mandatory E-Verify also does little to promote a "lawful workforce." Resp. Br. 60. E-Verify continues to be error-riddled. Arizona offers certain statistics regarding E-Verify, *id.* at 60-63, but ignores the most problematic—for instance, that work-authorized individuals who were foreign-born were *20 times* more likely to receive an erroneous tentative nonconfirmation than U.S.-born individuals. Pet. Br. 49 n.27. Concern about discrimination has plagued E-Verify, see AAJC Br. 15-25, which is a central reason Congress made E-Verify experimental and voluntary.

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[7] That the federal government *could* handle the burdens imposed if E-Verify were made mandatory by all States, Resp. Br. 60-63, even if true, does not undercut the case for preemption. E-Verify is federally administered and subsidized, and there is no doubt that increased E-Verify participation will increase costs for the federal government. U.S. Br. 27-34. It is for Congress, not Arizona, to decide whether the federal government should assume those costs.

Most important, however, are the words of the statute. Congress said four times that the program is "voluntary." 8 U.S.C. § 1324a note. Another 20 or more times it spoke of "elect[ing]" to participate, and expressly empowered employers to "terminate" their "election." IIRIRA § 402(c)(4); U.S. Br. 29. Congress also affirmatively required DHS to "widely publicize" the "voluntary nature of the pilot programs." IIRIRA § 402(d)(2). By what preemption theory Congress would require DHS to "widely publicize" a falsehood, Arizona does not say. Arizona's effort to mandate E-Verify violates the plain language of federal law, and therefore is preempted.

CONCLUSION

The Court should reverse the decision of the Ninth Circuit with instructions to vacate the judgment of the District Court.

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IN THE

Supreme Court of the United States

CHAMBER OF COMMERCE
OF THE UNITED STATES OF AMERICA *et al.*,
Petitioners,

v.

CRISS CANDELARIA *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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SUPPLEMENTAL BRIEF

The brief filed by the Acting Solicitor General in response to this Court's invitation confirms that this case warrants review by this Court. The United States agrees that "[t]he issues presented by the petition ... are important and recurring" and "warrant a grant of certiorari." U.S. Br. 8-9, 20. It confirms that multiple States have enacted statutes like the challenged provisions of the Legal Arizona Workers Act, which have "generated confusion among both employers and employees." *Id.* at 8-9. And, most fundamentally, it agrees with Petitioners that the Arizona law likely is preempted by federal law. *Id.* at 10-11 (discussing the Immigration Reform and Control Act of 1986 (IRCA) and the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA)). In each of these respects, the United States and Petitioners are in complete agreement.

The United States proposes, however, that this Court should limit its review to the first question presented—namely, whether the employer-sanctions provisions are *expressly* preempted—but deny review of (a) the E-Verify provision that is a fundamental component of the employer-sanctions provision, and (b) whether the employer-sanctions provisions are also *impliedly* preempted. *Id.* at 9-10. It, however, offers no persuasive justification for this artificial limitation. On the contrary, the United States itself demonstrates that the E-Verify provision is part and parcel of the employer-sanctions law, and that the challenged provisions are impliedly preempted, for many of the same reasons they are expressly preempted. These questions, no less than the issue concerning employer sanctions, are important and recurring, and were decided wrongly below. Moreo-

ver, the overlapping factual and legal issues among the three questions presented will enhance the Court's ability to evaluate the overall question of the relationship between federal and state laws regulating the employment of illegal aliens, which further justifies simply granting the petition.

I. WHETHER THE EMPLOYER-SANCTIONS PROVISIONS ARE EXPRESSLY PREEMPTED WARRANTS THIS COURT'S REVIEW.

The United States agrees that the Ninth Circuit erred when it held that the employer-sanctions provisions of the Arizona statute are not expressly preempted, and it agrees that certiorari should be granted on this issue. U.S. Br. 10-15. Those state provisions, the United States correctly explains, "disrupt[] the careful balance struck by Congress in IRCA." *Id.* at 9, 14. Moreover, they "impos[e] civil or criminal sanctions ... upon those who employ [or hire] unauthorized aliens," and cannot be considered mere "licensing ... laws," and therefore are expressly preempted. *Id.* at 10 (quoting 8 U.S.C. § 1324a(h)(2)). The validity of these provisions and their relationship to federal immigration policy constitute "an important question of federal law that has not been, but should be, settled by this Court." *Id.* at 9 (quoting Sup. Ct. R. 10(c)).

II. WHETHER THE MANDATORY E-VERIFY PROVISION IS IMPLIEDLY PREEMPTED WARRANTS THIS COURT'S REVIEW.

The United States also agrees that the Ninth Circuit badly erred in evaluating Arizona's mandatory E-Verify provision. U.S. Br. 15 (finding "substantial reason to doubt whether the Ninth Circuit was correct in holding that, under [IIRIRA], States may mandate participation in the federal E-Verify pro-

gram"). In an analysis that comprises the great majority of its discussion of E-Verify, the brief sets forth at least five reasons why this is so:

- Congress created E-Verify as a "voluntary" program and intended that "participation [would] be achieved through individual election rather than a blanket mandate on all employers." *Id.* at 16.
- The statutory language "contains no indication that Congress intended to permit States to undermine its own decision not to impose a blanket mandate on all employers by allowing States to impose just such a mandate." *Id.* at 17.
- "Congress's determination that E-Verify be administered by federal employees using federal resources further suggests that state and local governments may not require employers to participate." *Id.*
- "The nature of what an employer must agree to in order to participate in E-Verify casts further doubt on the Ninth Circuit's conclusion that States and localities may mandate participation in the absence of federal authorization to do so." *Id.*
- "Absent congressional authorization nowhere present in this statute, a State may not restructure in this fundamental way [*i.e.*, by mandating participation] the regulatory relationships and functions of a federal agency." *Id.* at 18.

And, most fundamentally, the United States appears to agree that one of this Court's criteria for certiorari is met: The issue of mandatory E-Verify "raise[s]

'important federal question[s].'" *Id.* at 20 (second alteration in original). Nevertheless, the United States asserts that "this Court's review is not now warranted on the E-Verify question." *Id.* The reasons that it gives in passing, however, do not support its conclusion.

First, the United States says, "the Arizona statute contains no direct mechanism for enforcing its requirement that all employers use E-Verify." *Id.* The significance of an independent "enforcement mechanism," however, is unclear. The Arizona statute mandates the use of E-Verify and links substantial benefits to its use. It provides unequivocally that "every employer, after hiring an employee, shall verify the employment eligibility of the employee through the e-verify program." Ariz. Rev. Stat. § 23-214. The Arizona Department of Revenue instructed Arizona employers that they must comply. Pls./Appellant's Excerpts of Rec. 297-99, No. 07-17272 (9th Cir. filed Mar. 31, 2008). There are no exceptions to the requirement, and no reason to doubt that employers will feel compelled to comply with this clear mandate. On the contrary, non-compliance leads to the denial of state economic development incentives, see Ariz. Rev. Stat. § 23-214 (as the United States acknowledges, U.S. Br. 20). And, more fundamentally, E-Verify is an important component of the employer-sanctions provision that the Court would be reviewing anyway. The use of E-Verify "creates a rebuttable presumption that [the] employer did not knowingly employ an unauthorized alien" in violation of the Act. Ariz. Rev. Stat. § 23-212(I). A state provision that mandates participation in E-Verify conflicts with the system designed and enacted by Congress, see U.S. Br. 15-18, and warrants this Court's review.

Second, the United States says that E-Verify is a "still-evolving federal program whose nature and scope ... may change again in the near future." *Id.* at 20. But this is true of numerous statutes, and could justify denying review in nearly every statutory case. Notably, however, the United States offers no assurance or prediction that E-Verify is *likely* to change in any meaningful particular. On the contrary, as the United States itself explains, E-Verify has been in existence since 1996, and has been reauthorized multiple times since th see *id.* at 2-3—including as recently as 2009.[1] Proposals to make the system mandatory have been introduced on several occasions, and always rejected. *E.g.*, H.R. 98, 110th Cong., § 5(a) (2007); H.R. 1951, 110th Cong., § 3 (2007).

And in the meantime, numerous states continue to enact E-Verify-based statutes, in plain violation of the federal statute, see U.S. Br. 15-18, and contrary to the principle of uniformity that has consistently been a key congressional goal, see IRCA, Pub. L. No. 99-603, § 115, 100 Stat. 3359, 3384 (1986). In the few months since the Petition was filed, two more states have enacted E-Verify mandates (in addition to the six which previously required participation in E-Verify). See Utah Code Ann. § 13-47-201 (Utah S.B. 251 (2010)); Va. Code Ann. § 40.1-11.2 (Va. H.B. 737 (2010)); see also Pet. 15-16. Dozens of other state legislatures have considered similar proposals. See Nat'l Conf. of State Legislatures, *2010 Immigration-Related Bills and Resolutions in the States* (Apr. 27, 2010), http://www.ncsl.org/portals/1/documents/immig/immigration_report_april2010.pdf. To wait for two more years, as the United States proposes, to see

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[1] Department of Homeland Security Appropriations Act, Pub. L. No. 111-83, § 547, 123 Stat. 2142, 2177.

whether Congress revisits E-Verify is intolerable if, as Petitioners and the United States agree, these laws are unconstitutional.

Relatedly, the United States says that "issues regarding E-Verify should be resolved, at least in the first instance, by the political branches." U.S. Br. 20-21. This is not an argument against certiorari. Congress has spoken: It created E-Verify as an expressly voluntary program, "[to] be administered by federal employees using federal resources," and intentionally crafted the statute in a way that, as the United States acknowledges, "would appear to bar Arizona's mandate." *Id.* at 16-17. The question in this case is not whether Congress can or should act—it already has—but whether Congress's enactment should be interpreted to preclude state laws in the same field. That question is plainly one for the courts.

Third, the United States says that the E-Verify provision need not be reviewed because "[t]he Arizona statute is not *currently* creating a strain on federal resources." U.S. Br. 21 (emphasis added). Even accepting this curious statement as true,[2] burdens on the federal government are not the only ones that matter. Permitting states to impose different and conflicting verification requirements imposes substantial burdens on employers and employees alike. Among other things, Congress recognized that employers would face increased costs in developing hiring procedures, and may decline to employ individu-

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[2] The word "currently" in the government's statement seems to have been chosen carefully. The United States concedes that "participation requirements imposed by [other] state or local governments may overload otherwise elective federal programs," U.S. Br. 17, and there is no question that states and localities are going to continue to enact laws mandating E-Verify and further strain federal resources, *supra* at 5.

als who appear to pose a risk of an immigration violation. Pet. 17-18. A report commissioned by the Department of Homeland Security found an increased risk of discrimination associated with mandatory E-Verify requirements. See Pet. Reply 2 n.1; see also Br. of *Amici Curiae* National Employment Law Project et al. 3-5; Br. of *Amici Curiae* Asian American Justice Center et al. These concerns that animate Congress to regulate comprehensively amply justify this Court's review, even if federal agencies are willing to suffer their own burdens.

Ultimately, the United States' discussion of the E-Verify provision makes clear that review is warranted. It explains at length that E-Verify mandates (like Arizona's) conflict with federal immigration policy approved by Congress, and are preempted under the Supremacy Clause. U.S. Br. 15-18. It notes that hundreds of similar immigration-related bills and resolutions are being introduced and considered in state legislatures across the country, and suggests that these provisions "raise significant legal issues" and, without guidance from this Court, will continue to "generate[] confusion among both employers and employees." *Id.* at 8-9. This is exactly why the implementation of E-Verify raises an "important federal question[]." *Id.* at 20 (quoting Sup. Ct. R. 10(c)).

III. WHETHER THE EMPLOYER-SANCTIONS PROVISIONS ARE IMPLIEDLY PREEMPTED WARRANTS THIS COURT'S REVIEW.

Finally, at the same time this Court considers whether the Arizona statute is *expressly* preempted—which the United States agrees is appropriate—it should at the same time consider whether the challenged provisions are *impliedly* preempted. The United States argues that "the Court need not consider any questions of implied preemption" because

the employer-sanctions provisions are in fact expressly preempted by 8 U.S.C. § 1324a(h)(2). U.S. Br. 21-22. Petitioners certainly agree that there is express preemption, but of course it is possible that this Court might conclude otherwise—in which case the Court should have the implied preemption issue available and fully briefed in order fully to evaluate the Supremacy Clause implications of Arizona's intrusion into immigration policy.

If this Court grants certiorari to consider express preemption, there is no good cause to ignore implied preemption. Both theories were pressed and passed upon below, and the same basic considerations underlie both inquiries: the statute's language,[3] structure,[4] purpose and history,[5] and the overall statutory and regulatory scheme.[6] The "ultimate touchstone" of any preemption analysis—express or implied—is the "purpose of Congress." *E.g.*, *Wyeth* v. *Levine*, 129 S. Ct. 1187, 1194-95 (2009) (implied); *Medtronic, Inc.* v. *Lohr*, 518 U.S. 470, 485-86 (1996) (express). As this Court has explained, "express preemption" and "implied preemption" are not "rigidly distinct" categories, but rather describe different applications of a common doctrine. *English* v. *Gen. Elec. Co.*, 496 U.S. 72,

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[3] *Geier* v. *Am. Honda Motor Co.*, 529 U.S. 861, 875-78 (2000) (implied); *CSX Transp., Inc.* v. *Easterwood*, 507 U.S. 658, 664 (1993) (express).

[4] *Freightliner Corp.* v. *Myrick*, 514 U.S. 280, 286 (1995) (express); *English* v. *Gen. Elec. Co.*, 496 U.S. 72, 87-88 (1990) (implied).

[5] *City of Columbus* v. *Ours Garage & Wrecker Serv., Inc.*, 536 U.S. 424, 440-42 (2002) (express); *Int'l Paper Co.* v. *Ouellette*, 479 U.S. 481, 493-94 (1987) (implied).

[6] *Bates* v. *Dow Agrosciences LLC*, 544 U.S. 431, 441-45 (2005) (express); *Buckman Co.* v. *Plaintiffs' Legal Comm.*, 531 U.S. 341, 348 (2001) (implied).

78-79 & n.5 (1990). Notwithstanding the "terminological" difference, *Geier* v. *Am. Honda Motor Co.*, 529 U.S. 861, 873-74 (2000), this Court has consistently recognized that the two concepts are intertwined, and has routinely considered both aspects of preemption when raised. *E.g.*, *id.*; see also, *e.g.*, *Altria Group, Inc.* v. *Good*, 129 S. Ct. 538, 543 (2008) ("Congress may indicate pre-emptive intent through a statute's express language or through its structure and purpose."); *CSX Transp., Inc.* v. *Easterwood*, 507 U.S. 658, 673 n.12 (1993) (rejecting a claim of implied preemption "on the basis of the preceding [express preemption] analysis").

The United States' own brief indeed demonstrates that these questions are entwined. It argues, for instance, that the Arizona statute disrupts the "careful balance struck by Congress in IRCA." U.S. Br. 12-14 (citing *United States* v. *Locke*, 529 U.S. 89, 106-07 (2000)). It makes this point in the context of express preemption, but the point equally supports implied preemption, and shows the artificiality of limiting the Court's focus in this case. See, *e.g.*, *Bonito Boats, Inc.* v. *Thunder Craft Boats, Inc.*, 489 U.S. 141, 161 (1989). Given the overlap among these issues, and to ensure that the constitutionality of the Arizona Act (and similar state provisions) is fully addressed in this case—leaving no unnecessarily unresolved issues that otherwise would require further litigation in the lower courts—the most reasonable and efficient course is to grant certiorari to consider both implied and express preemption.

The remainder of the United States' argument is devoted to distinguishing *Hoffman Plastic Compounds, Inc.* v. *NLRB*, 535 U.S. 137 (2002). U.S. Br. 21-22. *Hoffman* may not be on all fours with this case, but it plainly stands for the proposition—which

the United States elsewhere embraces, U.S. Br. 15, and which the Ninth Circuit erroneously ignored, Pet. App. 39a-40a—that this Court's earlier decision in *De Canas* v. *Bica*, 424 U.S. 351 (1976), described a federal legislative landscape that no longer exists.[7] That the United States may not want certain aspects of *Hoffman* put at issue is understandable, and Petitioners have no objection to a modest reframing of the Questions Presented to that end.[8] What is important, and what the United States does not meaningfully dispute, is that this Court consider express and implied preemption together.

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[7] *See* Pet. 20-22; *Hoffman*, 535 U.S. at 147 (IRCA created a "comprehensive scheme" for regulating the employment of undocumented aliens and "forcefully made combating the employment of illegal aliens central to the policy of immigration law"; discussing and distinguishing *De Canas*) (alteration omitted).

[8] This could be accomplished, for example, by deleting the citation to *Hoffman* in the third question.

CONCLUSION

For the foregoing reasons, and those set forth in the Petition and the Reply, the Petition for a Writ of Certiorari should be granted.

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CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA, *et al.*,

Petitioners,

vs.

CRISS CANDELARIA, *et al.*,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

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Respondents submit this supplemental brief to respond to the United States' amicus brief ("Amicus") recommending that this Court grant the Petition for Certiorari on the first question presented, which addresses whether federal law preempts Arizona's employer sanctions law. Respondents respectfully urge this Court to deny the Petition in its entirety. Although immigration is a critically important national issue, it requires the attention of Congress, not this Court, at this time.

I. This Court Should Deny Review of Arizona's Law Imposing Sanctions Against Employers That Hire Unauthorized Aliens.

As the United States acknowledges, there is no circuit split on the question of whether IRCA preempts employer sanctions statutes such as Arizona's, Amicus at 8, and only six states have similar laws, *id.* at App. 1a-2a. Although the United States asserts that Arizona's new law has "generated confusion among both employers and employees," Amicus at 9, Arizona's employer sanctions law imposes no new obligations on either group. Rather, it authorizes the revocation or suspension of state licenses if an employer knowingly or intentionally employs unauthorized aliens. A.R.S. §§ 23-212, -212.01. Federal law has prohibited the same conduct since Congress enacted IRCA in 1986, and IRCA specifically preserved state authority to impose sanctions "through licensing and similar laws." 8 U.S.C. § 1324a(h)(2). The concerns that the United States raises are policy

arguments that favor a narrower savings clause than Congress enacted in IRCA. Their concerns do not warrant granting the Petition for Certiorari to review the lower court's decision in this pre-enforcement facial challenge of Arizona's sanctions law.

1. The United States' amicus brief asserts that Arizona's law is not within IRCA's savings clause for state sanctions through "licensing and similar laws," 8 U.S.C. § 1324a(h)(2), because Arizona's law "establishes neither a process nor any general standards for assessing an applicant's character or fitness to engage in a particular activity." Amicus at 11. This is not a correct description of either the scope of "licensing and similar laws," or Arizona's employer sanctions statutes. Although the United States cites *Drye v. United States*, 528 U.S. 49 (1999) for the proposition that the definition of "licensing and similar laws" is a matter of federal law (Amicus at 11), neither that case nor IRCA provides a definition for the term "license" in this context. As the Ninth Circuit correctly observed, a "license" encompasses any permission or authorization from the government to engage in a certain profession, business, or other type of conduct. *See* Pet. App. 17a; *see also Black's Law Dictionary* 938 (8th Ed. 2004) (defining "license" as a "permission, usually revocable, to commit some act that would otherwise be unlawful"). The United States offers no authority for narrowing the ordinary meaning of "license" to include only licenses that are issued as part of a system that determines the fitness of the person to engage in the activity. Although the

fitness of a person to engage in an activity may be part of many licensing schemes, it is not a characteristic of all of them.

Consistent with federal law, Arizona's statute requires all Arizona licensees to refrain from knowingly or intentionally employing unauthorized aliens and provides for the suspension or revocation of those licenses for violating this requirement. The statutes establish a process that requires a judicial proceeding through Arizona courts to impose state sanctions against Arizona licensees. A.R.S. § 23-212, -212.01; *see also* Ariz. R. Civ. P. 65.2 (court rule governing actions filed pursuant to A.R.S. § 23-212, and -212.01). The United States criticizes Arizona's statute for permitting the suspension or revocation of all of a person's licenses through a state judge rather than on a license-by-license basis by the administrative agency that issued the license. Amicus at 11. But Congress did not specify any particular process when it preserved state authority to impose sanctions against employers "through licensing and similar laws." 8 U.S.C. § 1324a(h)(2). It left the procedural details to the states. Although the states, of course, must satisfy due process requirements, the choice of an administrative process or a judicial process for imposing sanctions is a matter of state discretion. In any case, if the problem with Arizona's law is that it permits a single judicial proceeding to accomplish what – in the United States' view – should require multiple administrative proceedings, this is an issue

of form not substance and does not warrant this Court's review in a facial challenge.

2. The United States also argues that the Ninth Circuit decision upholding Arizona's law violates the maxim that exceptions should not be permitted to "'swallow the rule.'" Amicus at 11 (quoting *Cuomo v. Clearing House Ass'n, L.L.C.*, 129 S. Ct. 2710, 2718 (2009)). Based on this principle, the United States opposes reading IRCA's preemption provision to permit states to impose a licensing sanction that terminates an employer's business operations in a state but to prohibit states from imposing even minimal fines. Amicus at 11. But Congress enacted a preemption provision that specifically permits states to impose sanctions "through licensing and similar laws" and prohibits them from imposing other civil or criminal sanctions. 8 U.S.C. § 1324a(h)(2). The state sanction revoking a business license may be a more serious penalty than a small civil penalty, but that is the effect of the preemption provision that Congress chose. The United States' concern does not identify a defect in the lower courts' analysis requiring this Court's review but raises instead a policy concern about the scope of the preemption provision that Congress enacted in IRCA.

3. Similarly, the United States' argument that the Ninth Circuit's reading of § 1324a(h)(2) disrupts the "delicate balance" that Congress struck in IRCA's employer sanctions scheme (Amicus at 12) ignores that the savings clause for state sanctions through "licensing and similar laws" is part of the balance

that Congress struck. Before IRCA, this Court recognized that establishing sanctions against employers that hired unauthorized aliens was "within the mainstream of [state] police power." *DeCanas v. Bica*, 424 U.S. 351, 356 (1976). When Congress established employer sanctions in IRCA in 1986, it then specifically preserved state authority to impose sanctions against employers "through licensing and similar laws." By preserving state sanctions through licensing laws, IRCA provided a comprehensive scheme that imposed civil and criminal penalties nationally and left states the discretion to impose penalties against state licenses. Because states issue licenses, it makes sense for Congress to leave them with discretion to determine when employing unauthorized aliens justifies suspending or revoking such licenses.

Preserving state authority over state licenses does not undermine the procedural protections in IRCA. The federal system provides for administrative proceedings to impose civil sanctions, 8 U.S.C. § 1324a, and Congress did not specify any procedural requirements for state licensing sanctions. Arizona's choice to impose sanctions against state licenses in judicial proceedings in no way conflicts with any provision in IRCA. State licensing sanctions also do not disrupt the federal protections against employment discrimination. All federal protections against discrimination remain in place.

4. Although it is true that this Court's decision in *DeCanas* pre-dates IRCA, it still provides a useful framework for lower courts to apply when analyzing

the preemption of state laws relating to immigration. Unquestionably, the preemption of employer sanctions now turns on the language of § 1324a(h)(2), which was not at issue in *DeCanas*. But the Court's recognition that not every state law that touches on immigration is "per se pre-empted," *DeCanas,* 424 U.S. at 355, and that state and local legislation that affects immigration is a valid exercise of state police powers, *id.* at 356-57, remain important principles. *See Madeira v. Affordable Hous. Found., Inc.,* 469 F.3d 219, 228, 238 (2d Cir. 2006) (finding that IRCA did not preempt tort recovery for unauthorized employee).

The United States further argues that after IRCA "*DeCanas* provides no support for applying a presumption against preemption in this case." Amicus at 15. Importantly, a presumption against preemption is not necessary to determine that Arizona's law providing for the suspension and revocation of licenses is within IRCA's savings clause for state sanctions "through licensing and similar laws." *See Cuomo*, 129 S. Ct. at 2720 (Court did not invoke the presumption against preemption, considering it "unnecessary to do so in giving force to the plain terms of the National Bank Act.") Nevertheless, *DeCanas* and the history of Congressional regulation of employer sanctions do, in fact, support applying a presumption against preemption in this context. *DeCanas* recognized that regulation of employment within a state is traditionally an area of state concern. 424 U.S. at 356-57. And Congress did not establish any regulations on the

subject of employer sanctions until it enacted IRCA in 1986. This is not an area in which Congress exercised its authority "from the earliest days of the Republic." *Cuomo,* 129 S. Ct. at 2720 (quoting *United States v. Locke,* 529 U.S. 89, 108 (2000)). Rather, it is an area that historically was in the "mainstream" of a state's police power. *DeCanas,* 424 U.S. at 356.

5. The United States' analysis provides no sensible meaning of IRCA's savings clause that preserves state sanctions through "licensing and similar laws." Under the United States' view, a law that permits individual licensing authorities to suspend or revoke a business license might be a licensing law within IRCA's savings clause (Amicus at 11), but such a law would seemingly, under the United States' reasoning, still disrupt IRCA's "delicate balance" (Amicus at 12) by authorizing State license revocations when the federal law imposes small financial penalties for the same misconduct (Amicus at 11). The United States' preference for broader preemption of state laws cannot be squared with the language of the savings clause that Congress enacted in § 1324a(h)(2).

The preemption issue in this case, which arises from a pre-enforcement challenge of an Arizona law, does not require this Court's attention now. The United States asserts that guidance is needed "from either Congress or this Court." This Court should permit Congress to address the issue rather than grant the Petition for Certiorari in this case. Although Congress enacted IRCA nearly twenty-five years ago, it has only been within the past few years

that Arizona and a handful of other states have enacted legislation within IRCA's savings clause. *See* Amicus App. 1a-2a. Congress has not yet had an opportunity to respond to the states' rising frustration over ineffective federal immigration enforcement. The political branches of the federal government should address these issues now, not this Court.

II. Respondents Support the Solicitor's Recommendations That This Court Deny the Petition for Certiorari Regarding the Questions Concerning E-Verify and *Hoffman Plastic.*

1. Respondents concur with the United States' conclusion that the E-Verify issue does not warrant this Court's review. Amicus at 20-21. Congress will be re-examining the E-Verify program because it is subject to sunset in 2012. *Id.* And Arizona law imposes no penalty against an employer that fails to participate in E-Verify. A.R.S. § 23-214(A). While the appeal in this case was pending at the Ninth Circuit, Arizona law was amended to require recipients of state grants to use E-Verify, but that requirement was not challenged in this case. A.R.S. § 23-214(B) (added by 2008 Ariz. Sess. Laws ch. 152, § 6). While Respondents concur that this Court should decline to review the E-Verify issue, they disagree with the United States' criticism of the lower court decisions upholding Arizona's E-Verify requirement for the reasons set forth in the decisions below (Pet. App. 19a-22a) and in the Brief in Opposition.

2. Respondents also concur with the United States' recommendation to deny the question presented concerning *Hoffman Plastic Compounds v. NLRB*, 535 U.S. 137 (2002). *Hoffman* was not a preemption case, and therefore it does not inform the analysis of the issues in this case.

CONCLUSION

There is undeniably a serious problem with illegal immigration and unauthorized workers in this country. In enacting the employer sanctions law, Arizona attempted to craft legislation within IRCA's savings clause. This Court should not intervene in this case but rather should give the political branches an opportunity to address the issues.

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AMICUS CURIAE BRIEF

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In the Supreme Court of the United States

CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA, ET AL., PETITIONERS

v.

MICHAEL B. WHITING, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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QUESTIONS PRESENTED

Federal immigration law expressly preempts "any State or local law imposing civil or criminal sanctions (other than through licensing and similar laws) upon those who employ, or recruit or refer for a fee for employment, unauthorized aliens." 8 U.S.C. 1324a(h)(2). The Legal Arizona Workers Act, an Arizona statute, imposes civil sanctions on employers that knowingly or intentionally employ an unauthorized alien, up to and including the mandatory revocation of articles of incorporation, partnership agreements, and other documents that the Arizona statute defines as "licenses." The questions presented are:

1. Whether the Arizona statute is saved from express preemption as a "licensing [or] similar law[]."

2. Whether the Arizona statute conflicts with the federal framework regulating the employment of unauthorized aliens and therefore is impliedly preempted.

3. Whether the Arizona statute's requirement that all employers participate in a federal electronic employment verification system conflicts with, and is preempted by, the federal law establishing that verification system, which provides that participation shall be voluntary.

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United States v. *Singh*, 390 F.3d 168 (2d Cir. 2004) 13

Statutes and regulations:

Basic Pilot Extension Act of 2001, Pub. L. No. 107-128, § 2, 115 Stat. 2407 4
Basic Pilot Program Extension and Expansion Act of 2003, Pub. L. No. 108-156, 117 Stat. 1944 4
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Consolidated Security, Disaster Assistance, and Continuing Appropriations Act, Pub. L. No. 110-329, Div. A, § 143, 122 Stat. 3580 4
Department of Homeland Security Appropriations Act, 2010, Pub. L. No. 111-83, § 547, 123 Stat. 2177 ..... 4, 5
Farm Labor Contractor Registration Act of 1963, 7 U.S.C. 2041 *et seq.* (1976) 20
7 U.S.C. 2041(a) (1976) 20
7 U.S.C. 2043 (1976) 20

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Statutes and regulations—Continued:

7 U.S.C. 2044(b)(6) (1976) 20

7 U.S.C. 2051 (1976) 21

Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, Div. C, Tit. IV, 110 Stat. 3009-655, (8 U.S.C. 1324a note) 2

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Statutes and regulations—Continued: Page

Immigration and Nationality Act, 8 U.S.C. 1101 *et seq.* 2
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8 U.S.C. 1324a(a)(1) 2
8 U.S.C. 1324a(a)(3) 3
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8 U.S.C. 1324a(f) 3
8 U.S.C. 1324a(f)(1) 17
8 U.S.C. 1324a(f)(2) 17
8 U.S.C. 1324a(h)(2) 3, 7, 10, 22
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8 U.S.C. 1324b(a)(1) 17
8 U.S.C. 1324b(g)(2)(B)(iv)(I)-(III) 18
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Statutes and regulations—Continued: Page

Immigration Reform and Control Act of 1986, Pub. L. No. 99-608, 100 Stat. 3359 1
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29 U.S.C. 1813(a)(6) 22
29 U.S.C. 1816 (1982) 21
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§ 4-210(A)(8) 12
§ 4-210(A)(12) 12
§ 10-203 15
§§ 23-521 *et seq.* (1995 & Supp. 2009) 12
§ 29-308 (1998) 15
§ 29-631 15
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§ 32-1232(C)(1) 20
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Legal Arizona Workers Act, Ariz. Rev. Stat. §§ 23-211 *et seq.* (Supp. 2009) 1
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43 Pa. Stat. Ann. (West Supp. 1985):
§ 1301.306 21
§ 1301.503(1) 21
§ 1301.505(3) 21
§ 1301.606(a) 21
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§ 3, 3 C.F.R. 193 (2009) 29
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28 C.F.R.:
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=316&id=3960 (last visited Sept. 3, 2010) 14

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Who Pays Unemployment Taxes?, https://www.azdes.gov /main.aspx?menu =316&id=3962 (last visited Sept. 3, 2010) 14

Black's Law Dictionary:

5th ed. (1979) 15

8th ed. (2004) 11

149 Cong. Rec. (2003):

pp. 29,761-29,764 33

p. 29,763 33

73 Fed. Reg. (2008):

p. 10,130 17

p. 10,136 17

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H.R. Rep. No. 682, 99th Cong., 2d Sess. (1986):

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H.R. Rep. No. 304, 108th Cong., 1st Sess. Pt. 1 (2003) ... 32

Institute for Survey Research & Westat, *INS Basic Pilot Evaluation: Summary Report* (Jan. 19, 2002) 32

S. Rep. No. 202, 88th Cong. 1st Sess. (1963) 21

S. Rep. No. 1295, 93d Cong. 2d Sess. (1974) 20

The E-Verify Program for Employment Verification Memorandum of Understanding, http://www.uscis.gov/files/nativedocuments/MOU.pdf (Oct. 29, 2008) 34

United States GAO, *PAD-80-22, Illegal Aliens: Estimating Their Impact on the United States* (1980) 18, 22

Miscellaneous—Continued: Page

Webster's Third New International Dictionary (1993) 15

Westat, *Findings of the E-Verify Program Evaluation* (Dec. 2009), http://www.uscis.gov/USCIS/E-Verify/E-Verify/Final%20E-Verify%20Report%2012-16-09_2.pdf 31, 33

In the Supreme Court of the United States

No. 09-115

CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA, ET AL., PETITIONERS

v.

MICHAEL B. WHITING, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING PETITIONERS

INTEREST OF THE UNITED STATES

This case presents the question whether provisions of the Legal Arizona Workers Act (Arizona statute), Ariz. Rev. Stat. Ann. §§ 23-211 *et seq.*,[1] are preempted by federal law regulating the employment of aliens. The Department of Homeland Security (DHS) and Department of Justice enforce the prohibition against hiring unauthorized aliens, and the corresponding nondiscrimination provisions, that were enacted in the Immigration Reform and Control Act of 1986 (IRCA), Pub. L. No. 99-603, 100 Stat. 3359. See 8 U.S.C. 1324a, 1324b. DHS

[1] Unless otherwise indicated, Arizona statutory provisions appear in the 2009 supplement.

now administers the voluntary E-Verify program originally created by Title IV of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), Pub. L. No. 104-208, Div. C, 110 Stat. 3009-655. At the Court's invitation, the United States filed a brief at the petition stage of this case.

STATEMENT

1. a. Before 1986, the Immigration and Nationality Act (INA), 8 U.S.C. 1101 *et seq.*, did not specifically regulate the employment of unauthorized aliens. *De Canas* v. *Bica*, 424 U.S. 351 (1976). Congress changed course in IRCA, concluding that measures to prevent employers from hiring unauthorized aliens were necessary to reduce the incentive for aliens to come to the United States illegally. See, *e.g.*, H.R. Rep. No. 682, 99th Cong., 2d Sess. Pt. 1, at 46 (1986) (IRCA Report).

IRCA added two new provisions to the INA that are relevant here. The first prohibits employers from hiring unauthorized aliens and authorizes sanctions against employers that violate that prohibition. The second applies a parallel set of civil-rights protections to ensure that employers do not engage in racial, ethnic, or other invidious discrimination against legal immigrants and other minorities.

The employer-sanctions provision, 8 U.S.C. 1324a, prohibits employers from hiring for employment "an alien knowing the alien is an unauthorized alien," as well as hiring any individual "without complying with the requirements of [8 U.S.C. 1324a(b)]." 8 U.S.C. 1324a(a)(1). Subsection (b), in turn, establishes the paper-based "I-9 system," pursuant to which an employer must examine specified documents to verify a

new employee's identity and authorization to work in the United States. 8 U.S.C. 1324a(b); 8 C.F.R. 274a.2.

Employers that violate these requirements may be sanctioned. Immigration and Customs Enforcement (ICE), within DHS, brings such charges; an employer may seek a hearing before an administrative law judge (ALJ) in the Department of Justice. The ALJ may assess civil monetary penalties and issue cease-and-desist orders. Any sanctions may be reviewed in an administrative appeal and then by a federal court of appeals. 8 U.S.C. 1324a(e); 8 C.F.R. 274a.9(e) and (f); 28 C.F.R. 68.1 *et seq.*; see 8 C.F.R. 1.1(c). Employers that engage in a pattern or practice of violating the requirements may also be criminally prosecuted, enjoined, or restrained in proceedings brought in federal district court by the Attorney General. 8 U.S.C. 1324a(f). Good-faith compliance with the I-9 system generally establishes "an affirmative defense" against charges of knowingly employing an unauthorized alien. 8 U.S.C. 1324a(a)(3) and (b)(6).

Section 1324a expressly "preempt[s] any State or local law imposing civil or criminal sanctions (other than through licensing and similar laws) upon those who employ, or recruit or refer for a fee for employment, unauthorized aliens." 8 U.S.C. 1324a(h)(2).

b. In 1996, Congress directed the Attorney General (who was then responsible for immigration enforcement) to "conduct 3 pilot programs of employment eligibility confirmation." IIRIRA § 401(a), 110 Stat. 3009-655. The first (originally called the Basic Pilot Program) has evolved into what is now called E-Verify. (The other two pilot programs no longer exist.) E-Verify "is an internet-based system that allows an employer to verify an employee's work-authorization status." Pet. App. 10a. An

employer that participates in E-Verify and uses that system to confirm a new employee's identity and employment authorization is rebuttably presumed not to have knowingly hired an unauthorized alien. IIRIRA § 402(b), 8 U.S.C. 1324a note.[2]

In IIRIRA, Congress required that federal departments participate in one of the three pilot programs. § 402(e)(1)(A)(i). Employers that violate Section 1324a or 1324b also may be required to participate. § 402(e)(2). Subject to those exceptions, however, Congress provided that "the Attorney General may not require any person or * * * entity to participate in a pilot program." § 402(a), 110 Stat. 3009-656. Instead, IIRIRA states that an employer "may elect to participate in [a] pilot program," and describes such participation as "voluntary." *Ibid.*; see § 402(d)(2) and (3)(A) (referring to program's "voluntary nature").

The pilot program was originally to last four years and to be made available in at least "5 of the 7 States with the highest estimated population of aliens who are not lawfully present in the United States." § 401(b) and (c), 110 Stat. 3009-655 to 3009-656. Since 1996, Congress has on four occasions extended the program's term.[3] In the 2003 extension, Congress substituted the Secretary of Homeland Security (Secretary) for the Attorney Gen-

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[2] Unless otherwise indicated by a parallel citation from the Statutes at Large, references to sections of IIRIRA refer to the statute as subsequently amended and set out at 8 U.S.C. 1324a note.

[3] Basic Pilot Extension Act of 2001, Pub. L. No. 107-128, § 2, 115 Stat. 2407; Basic Pilot Program Extension and Expansion Act of 2003 (2003 Act), Pub. L. No. 108-156, 117 Stat. 1944; Consolidated Security, Disaster Assistance, and Continuing Appropriations Act, Pub. L. No. 110-329, Div. A, § 143, 122 Stat. 3580; Department of Homeland Security Appropriations Act (2010 Act), Pub. L. No. 111-83, § 547, 123 Stat. 2177.

eral, and directed the Secretary to make E-Verify available in all 50 States. 2003 Act, § 3(a) and (d), 117 Stat. 1944, 1945; IIRIRA § 401(c)(1). The E-Verify program is currently authorized through September 30, 2012. 2010 Act, § 547, 123 Stat. 2177.

2. a. The Arizona statute makes it a violation of state law for an employer to "knowingly" or "intentionally" employ "an unauthorized alien," and provides for enforcement of that prohibition in actions brought in state court by elected county attorneys. Ariz. Rev. Stat. Ann. §§ 23-212(A) and (D), 23-212.01(A) and (D). The Arizona statute defines "[u]nauthorized alien" by reference to federal law. *Id.* § 23-211(11) (incorporating 8 U.S.C. 1324a(h)(3)). In determining whether a particular alien meets that definition, the Arizona statute first provides that a state court "shall consider only the federal government's determination pursuant to 8 [U.S.C.] 1373(c)," *id.* §§ 23-212(H), 23-212.01(H), which requires federal officials to respond to inquiries about "the citizenship or immigration status of any individual." In its next sentence, however, the Arizona statute states that "[t]he federal government's determination" pursuant to Section 1373(c) creates only "a rebuttable presumption of the employee's lawful status." *Ibid.*

The Arizona statute does not require a prior federal determination of whether an employer knowingly or intentionally employed an unauthorized alien. Instead, the statute provides for the state court to make its own determination, subject to two evidentiary rules that refer to federal law. First, an employer's demonstration that it verified the employee's work authorization through the federal E-Verify program "creates a rebuttable presumption" that the employer did not violate the Arizona statute. Ariz. Rev. Stat. Ann. §§ 23-212(I),

23-212.01(I). Second, as under Section 1324a(a)(6), an employer "establishes an affirmative defense" to liability under the Arizona statute if it shows "that it has complied in good faith with the requirements of 8 [U.S.C.] 1324a(b)." *Id.* §§ 23-212(J), 23-212.01(J).

b. For a first knowing violation of the Arizona statute, the state court "[m]ay" order all relevant state agencies to suspend for up to ten business days "all licenses" held by the employer that are "specific to the business location where the unauthorized alien performed work," or, if the employer has no such licenses, "all licenses that are held by the employer at the employer's primary place of business." Ariz. Rev. Stat. Ann. § 23-212(F)(1)(c) and (d). For a first intentional violation, the court "shall" order such a suspension "for a minimum of ten days." *Id.* § 23-212.01(F)(1)(c).

Any first violation results in three to five years of probation. An employer on probation must file quarterly reports with respect to every new hire at the business location where the previous violation occurred. Ariz. Rev. Stat. Ann. §§ 23-212(F)(1)(b), 23-212.01(F)(1)(b). If the state court finds that an employer has committed a violation (whether knowing or intentional) while on probation, the court "shall order the appropriate agencies to permanently revoke all licenses" at the business location of the violation or the primary place of business. *Id.* §§ 23-212(F)(2) and (3)(b), 23-212.01(F)(2) and (3)(b).

The Arizona statute includes a general definition of a "[l]icense" as "any agency permit, certificate, approval, registration, charter or similar form of authorization that is required by law and that is issued by any agency for the purposes of operating a business in this state." Ariz. Rev. Stat. Ann. § 23-211(9)(a).

The Arizona statute further provides, however, that "[l]icense" also includes the organizing documents of corporations, partnerships, and limited liability companies. See *id.* § 23-211(9)(b)(i)-(ii). "Any professional license" is excluded, as are certain water and environmental permits. *Id.* § 23-211(9)(c).

c. The Arizona statute also requires that all employers "verify the employment eligibility of [every newly hired] employee through the [federal] e-verify program." Ariz. Rev. Stat. Ann. § 23-214(A). Failure to use E-Verify renders an employer ineligible for "any grant, loan or performance-based incentive from any [state or local] government entity." *Id.* § 23-214(B).

3. Petitioners brought this action to enjoin enforcement of the Arizona statute as expressly and impliedly preempted by federal law. After a bench trial on stipulated facts, the district court concluded that the Arizona statute is not preempted. Pet. App. 49a-94a.

4. The court of appeals affirmed. Pet. App. 1a-25a.

a. The court of appeals first concluded that the Arizona statute's employer-sanctions provisions fall within the savings clause permitting States to impose sanctions "through licensing and similar laws." 8 U.S.C. 1324a(h)(2); see Pet. App. 14a-19a. Relying on *De Canas, supra*, the court of appeals applied a presumption against preemption "because the power to regulate the employment of unauthorized aliens remains within the states' historic police powers." Pet. App. 16a. The court also determined that the Arizona "statute's broad definition of 'license' is in line with" the dictionary definition of the term and that IRCA's legislative history did not require a different result. *Id.* at 17a-18a.

The court further concluded that the employer-sanctions provisions are not impliedly preempted by federal law. Pet. App. 21a.

b. The court of appeals rejected petitioners' contention that the requirement to use E-Verify "is impliedly preempted because it conflicts with Congressional intent to keep the use voluntary." Pet. App. 19a. The court observed that "Congress could have, but did not, expressly forbid state laws from requiring E-Verify participation," and it determined that Congress's decision to make "participation * * * voluntary at the national level" did not "in and of itself indicate that Congress intended to prevent states from making participation mandatory." *Id.* at 20a. The court concluded that Congress "strongly encouraged" use of E-Verify "by expanding its duration and its availability," and that "Congress plainly envisioned and endorsed an increase in its usage." *Id.* at 21a.

SUMMARY OF ARGUMENT

I. The Arizona statute is expressly preempted because it does not fit into the narrow exception for "licensing and similar laws." The statute prohibits employing unauthorized aliens and punishes employers that violate that prohibition. That those employers happen to hold documents that the statute calls "licenses" does not turn the statute into a licensing law. No licenses are issued under the statute, and it does not regulate licensees' professional conduct or fitness to do a particular business. It only imposes punishment, and only for violation of a single, across-the-board rule. And the punishment it imposes extends far beyond any common understanding of "licenses": the Arizona statute provides for the suspension and termination of business

entities' very legal existence. Articles of incorporation and similar charters are not "licenses," and the Arizona statute's broad punitive sweep confirms that it is not a licensing law.

In addition, and independently, the Arizona statute is impliedly preempted because it upsets the careful balance that IRCA established. The INA permits federal officials to decide when to seek sanctions and requires them to do so within a carefully crafted framework of procedural and substantive protections, which include graduated penalties; specialized federal tribunals; federal judicial review; and civil-rights provisions that prevent discriminatory or overzealous enforcement. Not only does the Arizona statute omit these protections, it affirmatively contradicts them: it allows elected Arizona prosecutors to demand and obtain sanctions in Arizona courts even after federal officials decide to seek lesser penalties, or federal tribunals reject sanctions altogether. In finding no conflict with federal law, the court of appeals wrongly relied on *De Canas* v. *Bica*, 424 U.S. 351 (1976), which pre-dates and is superseded by Congress's determination in IRCA that restricting the employment of unauthorized aliens should be an essential part of the *federal* framework of immigration regulation. Indeed, the very state law upheld against a preemption challenge in *De Canas* was preempted by IRCA.

II. The requirement that employers enroll in E-Verify also conflicts with federal law and is preempted. Congress made voluntary participation a hallmark of E-Verify: the clear text provides that an employer "may" make a "voluntary election" to participate and "may terminate" that election. IIRIRA § 402(a) and (c)(3). The court of appeals erroneously relied on Congress's 2003 decision to give the program nationwide

scope; Congress did not thereby approve of any and all measures to expand participation.

ARGUMENT

I. FEDERAL LAW PREEMPTS THE ARIZONA STATUTE'S EMPLOYER-SANCTIONS PROVISIONS

The INA expressly preempts "any State or local law imposing civil or criminal sanctions * * * upon those who employ, or recruit or refer for a fee for employment, unauthorized aliens." 8 U.S.C. 1324a(h)(2). Neither respondents nor the court of appeals disputes that the Arizona statute is a sanctions law, Pet. App. 14a; Br. in Opp. 12, and all such laws are preempted unless they are "licensing and similar laws." Because the Arizona statute does not confer or administer any license to do anything, but instead creates an independent state-law prohibition against employing unauthorized aliens and prescribes a unique and mandatory sanction that sweeps far more broadly than the term "license" allows, the statute is not a "licensing [or] similar law[]" and is not saved from preemption.

The Arizona statute is also preempted because it disrupts the delicate balance that federal law embodies. Neither the savings clause nor principles of conflict preemption permit the States to undermine federal law in that manner.

A. The Arizona Statute Is Not A "Licensing Law"

The court of appeals erroneously concluded that because the Arizona statute mentions the term "license," it is within the scope of the savings clause. A mere intersection with "licenses" is not enough for a state statute to qualify as a "licensing * * * law[]." Rather, a licensing law must actually provide for the granting and

administration of licenses, not just the punishment of entities that happen to be licensees. Furthermore, the Arizona statute imposes sanctions that do not pertain to any "license" as Section 1324a uses that term.

1. No licenses are issued under the Arizona statute

The court of appeals' decision treated the savings clause as if it used the term "law related to licenses." Congress instead used the more specific term "licensing * * * law[]." "Licensing" is the participial form of a transitive verb. A licensing law, therefore, must at least be one pursuant to which licenses are granted to someone. Indeed, the court acknowledged that "'licensing' generally refers to '[a] governmental body's process of *issuing* a license.'" Pet. App. 17a (brackets in original; emphasis added) (quoting *Black's Law Dictionary* 940 (8th ed. 2004)). But the court then went on to hold that the Arizona law is saved from preemption as a licensing law because it "provides for the *suspension* of employers' licenses." *Ibid.* (emphasis added). That holding misapplied the ordinary meaning of "licensing."

The Arizona statute is not a "law" for the "licensing" of any activity, because no licenses are issued under the Arizona statute whatsoever. It does not establish an application process or any standards for assessing an applicant's fitness to engage in a particular type of activity. Its enactment did not require Arizona businesses to obtain state permission to engage in any new category of activity, nor did it provide a new way for businesses to obtain permission to engage in activities already requiring licensure. To the contrary, a large and paradigmatic category of licensing laws—those for the licensing of doctors, lawyers, and other professionals—are ex-

cluded from the Arizona statute altogether. Ariz. Rev. Stat. Ann. § 23-211(9)(b)(ii).

Instead, the Arizona statute provides only for the *suspension* or *revocation* of the various already-existing types of registrations that it defines, in sweeping terms, as "licenses." It appears as part of the state labor code, which principally regulates wages, hours, and working conditions, not licensure or fitness to do business.[4] And its new form of sanction does not fit within any existing framework for regulating licensees. The Arizona statute provides for an elected county attorney to request, and a court of general jurisdiction to order, that *all* licenses at a particular location be suspended or revoked. Indeed, for several categories of violations, suspension or revocation is mandatory. See Ariz. Rev. Stat. Ann. §§ 23-212(F)(2), 23-212.01(F)(1)(c) and (F)(2); see also *id.* §§ 23-212(F)(1)(c), 23-212.01(F)(1)(d) (mandatory suspension upon failure to file required affidavit). By contrast, virtually every true Arizona licensing statute empowers an expert regulatory agency to suspend or revoke a single license on specified grounds, with the choice of penalty—for even egregious misconduct—left to agency discretion. See, *e.g.*, *id.* § 4-210(A)(3), (8) and (12) (liquor license *may* be suspended or revoked based on felony conviction, association with racketeering, or knowing commission of perjury).

Thus, the Arizona statute does not create or provide for the issuance of any licenses, nor does it amend any law that does. Rather, it is a freestanding provision that specifies across-the-board penalties in the form of suspension or revocation of any existing license.

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[4] For the sole exception, see Ariz. Rev. Stat. Ann. §§ 23-521 *et seq.* (1995 & Supp. 2009) (licensure of private employment agents).

b. Such a single-purpose license-revocation law is not a "licensing law." Of course Congress understood that licensing laws *include* provisions for sanctioning licensees; that is why licensing laws fall within the scope of the express-preemption clause in the first place. But penalties are not automatically within the *exception* in that clause for "licensing * * * laws" merely because they are imposed on entities that happen to have received licenses under other provisions of state law. To the contrary, Congress's choice of the term "licensing law" indicates an intent simply to preserve a regulator's ability to evaluate its licensees' fitness to do business in its particular regulatory field—whether by conferring, withholding, renewing, or revoking a license. The Arizona statute, however, provides only for the punishment of entities that happen to be licensees; it lacks even the most elementary features of a licensing law.

Merely imposing a penalty on entities that happen to have received licenses does not amount to "licensing." For example, courts in criminal proceedings may sometimes order that licenses be suspended or forfeited, either as part of the criminal sentence or in a judgment of criminal forfeiture. See, *e.g.*, *United States* v. *Singh*, 390 F.3d 168, 190 (2d Cir. 2004) (criminal forfeiture of medical license); *Alvin* v. *State*, 42 P.3d 1156 (Alaska Ct. App. 2002) (criminal sentence including lifetime revocation of driver's license); *Brock* v. *State*, 299 S.E.2d 71, 72 (Ga. Ct. App. 1983) (criminal sentence including suspension of driver's license). But in ordinary usage, these criminal statutes are not "licensing laws."

2. *The Arizona statute imposes sanctions on holders of documents that are not licenses*

The court of appeals also erred in its conclusion that the Arizona statute defines the term "license" in a way that is "in line with" the federal statute's use of that term. Pet. App. 17a. Federal law controls the meaning of a term in a federal statute. See, *e.g.*, *Drye* v. *United States*, 528 U.S. 49, 58 (1999). The Arizona statute thus is not saved from preemption merely because Arizona chose to define the scope of its sanctions using the term "license." Rather, the sanctions must actually fall on "licenses" as Congress used that term. In fact, the Arizona statute extends far beyond any common understanding of "licensing." For that reason as well, it is not a "licensing law."

The court of appeals focused on the Arizona statute's general definition of "[l]icense" to include various forms of "authorization that [are] required by law and [are] issued by any agency for the purposes of operating a business in [Arizona]." Ariz. Rev. Stat. Ann. § 23-211(9)(a). But the Arizona statute also specifically treats as "[l]icense[s]" several other categories of documents, including "[a]rticles of incorporation," "[a] certificate of partnership [or] partnership registration," and a limited liability company's (LLC) "articles of organization." *Id.* § 23-211(9)(b). Indeed, even registration with the state agencies responsible for administering the state unemployment tax program—something every employer must do—appears to meet the law's definition of "license."[5] The inclusion of those documents makes

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[5] See Arizona Dep't of Econ. Sec., *Who Pays Unemployment Taxes*, https://www.azdes.gov/main.aspx?menu=316&id=3962 (last visited Sept. 3, 2010); Arizona Dep't of Econ. Sec., *Arizona Joint Tax Applica-*

clear that the Arizona statute is not a licensing law, but simply a means of punishing anyone who hires unauthorized aliens.

A license is "a right or permission granted in accordance with law * * * to *engage in some business or occupation*, to do some act, or to engage in some transaction which but for such license would be unlawful." *Webster's Third New International Dictionary* 1304 (1993) (emphasis added). Simply creating a business entity such as a corporation is not a license to do anything that a sole proprietor could not previously have done. Filing the articles of incorporation, for instance, simply commences a corporation's existence, see Ariz. Rev. Stat. Ann. § 10-203; it does not confer a license to do any particular business, which (if needed) must be issued separately. See, *e.g.*, *Black's Law Dictionary* 829 (5th ed. 1979) (defining "license" as "[a] permit, granted by an appropriate governmental body, * * * *to a person, firm, or corporation* to pursue some occupation or to carry on some business") (emphasis added). The same is true of a certificate of limited partnership or an LLC's articles of organization. See Ariz. Rev. Stat. Ann. § 29-308 (1998); *id.* § 29-631. See generally *id.* § 29-842(A) (licensed professionals generally may practice in any business-entity form they choose).

Thus, articles of incorporation and the like pertain not to a business entity's fitness to engage in a particular type of pursuit or business, but to its very *existence*. The Arizona statute's revocation penalty therefore is unlike any conventional license revocation: a corporation, partnership, or LLC whose existence is terminated must wind up its affairs and proceed to liquidation. By

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tion, https://www.azdes.gov/main.aspx?menu=316&id=3960 (last visited Sept. 3, 2010).

contrast, a business that loses an ordinary license continues to be a going concern even if it cannot continue to run a particular establishment or engage in a particular line of work.

Accordingly, even if a law limited to the revocation of licenses could be characterized as a "licensing law," the Arizona statute is not such a law; it is altogether untethered to the common meaning of licensure.[6]

B. The Structure And History Of The Federal Employer-Sanctions Provisions Confirm That The Arizona Statute Is Not Saved From Preemption

Section 1324a's context, purpose, and history reinforce the conclusion that the Arizona statute is not a "licensing law" that Congress saved from preemption. This Court has long "decline[d] to give broad effect to saving clauses where doing so would upset the careful regulatory scheme established by federal law." *United States* v. *Locke*, 529 U.S. 89, 106 (2000). And this Court has further warned that when "Congress has enacted a general rule," courts "should not eviscerate that legislative judgment through an expansive reading of a somewhat ambiguous exception." *Knight* v. *Commissioner*, 552 U.S. 181, 191 (2008) (citation omitted). This Court should not read the savings clause to permit such subversion of the statutory purpose.

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[6] Likewise, respondents cannot show that the Arizona statute is a "similar law[]" even if it is not a "licensing * * * law[]." The phrase "or similar" simply eliminates dispute about whether a document constitutes a "license" if it is formally denominated a "certificate" or a "permit" (for example). By contrast, articles of incorporation are neither licenses nor materially "similar" to licenses.

1. The federal employer-sanctions provisions reflect a careful balance

IRCA created a federal regime that imposes sanctions on employers that hire unauthorized aliens. But Congress acknowledged the "widespread fear" that employers would, out of an abundance of caution, respond to the possibility of sanctions by engaging in "employment discrimination against Hispanics and other minority groups." IRCA Report Pt. 1, at 49. Congress therefore took steps to combat "the potential for [an] unfortunate cause and effect relationship between sanctions enforcement and resulting employment discrimination." *Id.* Pt. 2, at 12.

First, Congress provided various procedural protections and limits on liability for employers accused of violating Section 1324a by employing unauthorized aliens. Hearings are held before federal tribunals, and an employer may obtain federal administrative and judicial review of adverse decisions. 8 U.S.C. 1324a(e)(3)(B), (e)(8) and (f)(2); 28 C.F.R. 68.53-68.56. And sanctions under federal law are far less severe than the revocation penalty the Arizona statute permits: outside pattern-or-practice cases, see 8 U.S.C. 1324a(f)(1), monetary penalties under federal law are now limited to $3200 per unauthorized worker in the case of a first violation, $6500 for a second violation, and $16,000 for a subsequent violation. 8 U.S.C. 1324a(e)(4); 73 Fed. Reg. 10,130, 10,136 (2008) (inflation adjustment).

Second, Congress enacted Section 1324b, which makes it "an unfair immigration-related employment practice" to discriminate based on citizenship or immigration status or based on national origin, 8 U.S.C. 1324b(a)(1), and establishes an administrative regime to enforce that prohibition that is essentially parallel to

the regime to enforce Section 1324a. In particular, the schedule of civil penalties under the two statutes is the same. Compare 8 U.S.C. 1324a(e)(4)(A)(i)-(iii), with 8 U.S.C. 1324b(g)(2)(B)(iv)(I)-(III). The adoption of that parallel regime implements Congress's judgment that "sanctions enforcement and liability" for employers that hire unauthorized aliens "must be" balanced by "an equally strong and readily available remedy if resulting employment discrimination occurs." IRCA Report Pt. 2, at 12.

2. Congress expressly preempted state laws that would disrupt that balance, and the savings clause must not be read to frustrate that goal

State sanctions provisions—even those that incorporate federal standards in other respects—are expressly preempted because of the risk that they will disrupt the careful balance that Congress struck.

a. At the time of IRCA's enactment, several States had adopted employer-sanctions provisions. See, *e.g.*, United States GAO, *PAD-80-22, Illegal Aliens: Estimating Their Impact on the United States* 45-46 & tbl.12 (1980) (*GAO Report*). Those States imposed smaller maximum fines than Congress authorized in IRCA, compare *id.* at 45 (maximum fine $1000), with 8 U.S.C. 1324a(e)(4)(A) (maximum fine $2000 per alien for a first offense).[7] Congress nonetheless decided to preempt even those modest state sanctions, in the interest of ensuring that the federal framework—with charg-

[7] Some also authorized criminal penalties of up to a year of imprisonment. *GAO Report* 45-46 & tbl.12. All of those state statutes, civil and criminal, lay largely unused: as of 1980, 11 States had adopted sanctions legislation but only a single employer had been sanctioned (by Kansas, in the amount of $250). *Id.* at 45, 47.

ing decisions by federal officials, adjudication by federal ALJs and federal courts, and calibrated penalties—would be the exclusive enforcement method.

b. Congress decided to exempt only one small category—licensing laws—from preemption. As the statutory backdrop and the legislative history demonstrate, that proviso creates only a narrow exception, directed primarily at farm labor contractors, an industry often found to employ unauthorized aliens and in which there was a longstanding tradition of concurrent federal-state enforcement. The licensing laws governing farm labor contractors were everything the Arizona statute is not: they required a license to engage in particular work, prescribed qualifications for licensure, and provided for the denial or revocation of such a license based on unlawful acts germane to the licensee's fitness to do a particular business. See pp. 20-22, *infra*. And even in that context, Congress fashioned a calibrated federal framework to constrain the sanctions.

A House Committee Report on IRCA explained that Congress did not wish to preempt state licensing authorities from basing "the suspension, revocation or refusal to reissue a license" on the licensee's having "been found to have violated the sanctions provision *in this legislation*." IRCA Report Pt. 1, at 58 (emphasis added); see Pet. App. 18a (quoting this passage). Thus, the committee agreed, the States could impose non-monetary licensing sanctions that were based on *federally adjudicated* hiring violations—violations for which the Attorney General (now ICE) had filed charges and a federal tribunal designated under Section 1324a had found the employer liable. Many state licensing laws take such an "adjudicated violation" approach, under which the state regulator considers prior convictions as part of the appli-

cant's character and fitness for licensure. See, *e.g.*, Ariz. Rev. Stat. Ann. §§ 32-1232(C)(1), 32-1263(A)(2) (dentistry license may be denied or revoked based on conviction of a felony).

The committee also stated that it "d[id] not intend to preempt licensing or 'fitness to do business laws,' such as state farm labor contractor laws or forestry laws, which specifically require such licensee or contractor to refrain from hiring, recruiting, or referring undocumented aliens." IRCA Report Pt. 1, at 58; Pet. App. 18a. Both federal and state law had long identified farm labor contractors as particular targets of regulation, and restrictions on their hiring and referral practices were particularly germane to that regulation.

Farm labor contractors provide seasonal labor to farmers when they need it. Beginning with the Farm Labor Contractor Registration Act of 1963 (FLCRA), 7 U.S.C. 2041 *et seq.* (1976), Congress had provided for the federal licensure and regulation of such contractors, in part because unscrupulous contractors "exploit * * * migrant agricultural laborers" whose unauthorized status could force them to accept substandard wages and working conditions. 7 U.S.C. 2041(a) (1976); see S. Rep. No. 1295, 93d Cong., 2d Sess. (1974). The law was truly a licensing law: it required all farm labor contractors to obtain a federal certificate of registration, and it provided that the certificate could be denied, suspended, or revoked if the contractor engaged in the kind of abuses that made federal licensing and oversight necessary, including if the contractor knowingly employed an unauthorized alien. 7 U.S.C. 2043, 2044(b)(6) (1976). In 1983, Congress replaced the FLCRA with the Migrant and Seasonal Agricultural Workers Protection Act (MSWPA), 29 U.S.C. 1801 *et seq.*, but continued to pro-

vide that a certificate could be denied, suspended, or revoked based on knowing employment of unauthorized aliens. See 29 U.S.C. 1813(a)(3), 1816 (1982).

Both the FLCRA and the MSWPA provided that they were "intended to supplement State action" and that "compliance with [the FLCRA or MSWPA] shall not excuse [a regulated entity] from compliance with appropriate State law and regulation." 7 U.S.C. 2051 (1976); 29 U.S.C. 1871. Indeed, Congress recognized that a number of States already had similar farm-labor-contractor licensing schemes. S. Rep. No. 202, 88th Cong., 1st Sess. 4 (1963).

By the time IRCA was enacted, at least two of the States with their own such schemes had specified that knowingly hiring illegal aliens would be a ground for revocation or denial of a farm-labor-contractor license. See Or. Rev. Stat. §§ 658.440(2)(d), 658.445(1) (Supp. 1983) (permitting revocation or denial of license if licensee or applicant "[k]nowingly employ[s] an [unauthorized] alien"); 43 Pa. Stat. Ann. §§ 1301.503(1), 1301.505(3) (West Supp. 1985) (permitting revocation or denial of certificate if licensee or applicant employs "any person with knowledge that such person is in violation of any provision of the [federal] immigration and naturalization laws").*

In IRCA, Congress explicitly sought to harmonize the INA's new employer-sanctions provisions with the existing federal-state licensing scheme for farm labor contractors. IRCA replaced the MSWPA's restriction on farm labor contractors' employing unauthorized

* Both States also authorized civil penalties for violations of their farm-labor-contractor regulations, including the hiring provision. Or. Rev. Stat. § 658.453(1)(c) (Supp. 1983); 43 Pa. Stat. Ann. § 1301.306 (West Supp. 1985); see also *id.* § 1301.606(a) (criminal penalties).

aliens with a provision, 29 U.S.C. 1813(a)(6), permitting the suspension or revocation of a farm labor contractor's license only after the contractor "has been found to have violated" Section 1324a(a) (which applies to all employers) by one of the federal tribunals specified in that section. See IRCA § 101(b)(1)(B) and (C), 100 Stat. 3372. And IRCA did not modify the MSWPA's nonpreemption provision permitting concurrent federal-state regulation of farm labor contractors, 29 U.S.C. 1871.

This history illuminates the intended scope of Section 1324a(h)(2)'s savings clause. Before IRCA, pursuant to the FLCRA and later the MSWPA, States could require farm labor contractors to obtain a state license, in addition to the required federal license, and could revoke or suspend the state licenses of contractors who knowingly hired unauthorized aliens. At least two States had such laws at the time of IRCA. The savings clause in Section 1324a(h)(2) preserved such arrangements: States can conclude that a finding by federal authorities under Section 1324a that a contractor has hired unauthorized aliens is germane to a particular licensing scheme if such hiring has been integral to abuses the state licensing scheme seeks to prevent.

c. The Arizona statute is fundamentally different from the narrow group of laws that Congress decided to save, for several reasons. *First*, the Arizona statute permits extraordinarily severe sanctions—up to and including the termination of a corporation's legal existence—to be sought by locally elected prosecutors and imposed by state courts of general jurisdiction, not under a specialized federal adjudicatory framework. Congress expressly preempted sanctions laws that imposed fines as low as $200, see *GAO Report* 46 tbl.12; it would be exceedingly odd for Congress to have precluded small

fines but permitted sanctions that suspend or terminate a business entity's very existence. *Second*, and relatedly, the Arizona statute's requirement that employers operate in the shadow of that sweeping sanctions regime frustrates the balance in the federal framework resulting from the procedural protections of Section 1324a and the corresponding prohibition on immigration-related unfair employment practices. *Third*, far from imposing a "'fitness to do business'" requirement germane to a particular industry or profession, IRCA Report Pt. 1, at 58, the Arizona statute imposes a blanket penalty on *any* business found to be in violation. The Arizona statute therefore is not saved from preemption, notwithstanding its nominal focus on "licenses."

C. The Arizona Statute Obstructs The Administration Of The Federal Employer-Sanctions Framework

Even if this Court were to conclude, contrary to our submission above, that the Arizona statute could come within the scope of the savings clause, Congress plainly did not abandon ordinary conflict-preemption principles in IRCA. See, *e.g.*, *Buckman Co.* v. *Plaintiffs' Legal Comm.*, 531 U.S. 341, 352 (2001) ("[N]either an express pre-emption provision nor a saving clause 'bar[s] the ordinary working of conflict pre-emption principles.'") (quoting *Geier* v. *American Honda Motor Co.*, 529 U.S. 861, 869 (2000)) (second pair of brackets in original). Those principles independently require reversal of the decision below.

The Arizona statute's obstruction of Congress's goals and purpose is manifest. First, the Arizona statute permits Arizona prosecutors and courts to second-guess determinations made under the exclusive, carefully crafted federal framework for alleging and adjudicating

charges that an employer has knowingly employed unauthorized aliens. Federal law gives ICE authority to bring such charges; requires that federal tribunals decide whether the charges and defenses have been proved; and provides for appellate review by life-tenured federal judges. Although genuine state licensing laws may impose additional sanctions when a federal tribunal finds a violation and that violation is relevant to a licensee's fitness to do business, the INA does not permit a State to bring charges that ICE declined to bring, to find liability where the federal tribunal found none, or to impose sanctions beyond those provided under traditional licensing regimes.

Congress provided generally that federal immigration law "should be enforced vigorously *and uniformly*." IRCA § 115(1), 100 Stat. 3384 (emphasis added). Section 1324a itself makes clear that Congress did not countenance any state law requiring employers to litigate in a non-federal forum the lawfulness of their procedures to verify employment authorization. Congress specifically provided that the I-9 form, and copies of employees' associated documentation, may be used and retained only for purposes of complying with *specified federal laws*. See 8 U.S.C. 1324a(b)(5) ("A form designated or established by the Attorney General under this subsection and any information contained in or appended to such form, may not be used for purposes other than for enforcement of [the INA] and [specified federal criminal laws]."); see also 8 U.S.C. 1324a(b)(4) (restriction on use of copies of documentation); 8 C.F.R. 274a.2(b)(4). Congress recognized that requiring employers to gather identifying information from employees and retain copies of it throughout their employment posed significant privacy concerns, and it accordingly provided that those

documents would be reviewed only under the INA's *federal* enforcement framework, and associated criminal provisions. Accord IRCA Report Pt. 1, at 58 (Section 1324a does not preempt sanctions against a licensee "who *has been found* to have violated the sanctions provisions *in this legislation*") (emphases added). Yet under the Arizona statute, employers will likely need to use I-9 forms to prove that they complied with the I-9 procedure. See Ariz. Rev. Stat. Ann. §§ 23-212(J), 23-212.01(J).

Furthermore, Congress consciously rejected a regime that would have imposed sanctions without simultaneously protecting civil rights, because of the real and well-documented probability that such a law would lead employers to adopt discriminatory practices in an effort to avoid liability. Arizona has nonetheless adopted precisely such a sanctions-only regime, without the parallel procedural and civil-rights protections that IRCA included. See pp. 17-18, *supra*.

Against these considerations, the court of appeals erred in relying (Pet. App. 15a) on this Court's pre-IRCA decision in *De Canas* v. *Bica*, 424 U.S. 351 (1976). In *De Canas*, the Court rejected a preemption challenge to a California law barring employers from knowingly employing an unauthorized alien when doing so would have an adverse effect on lawful resident workers. *Id.* at 352. In reaching that conclusion, the Court observed that States had "broad authority under their police powers to regulate the employment relationship to protect workers within the State," and described the challenged law as "within the mainstream of" a State's police powers. *Id.* at 356.

But when *De Canas* was decided, federal law did not generally regulate the employment of unauthorized

aliens, unauthorized employment thus was only of "peripheral concern" under the INA, and the Court saw "Congress' failure to enact" such a law as evidence that "Congress believes this problem * * * is appropriately addressed by the States as a local matter." 424 U.S. at 360 & n.9. Since that time, however, Congress concluded in IRCA that the INA must prescribe measures to combat the employment of unauthorized aliens, because the availability of such employment undermines the INA's mission of regulating entry into the United States. See IRCA Report Pt. 1, at 46. Congress therefore enacted Section 1324a—just such a "general law[]" that makes it unlawful for employers to hire unauthorized aliens. *De Canas*, 424 U.S. at 360 n.9.[9] Congress thus has brought regulation of the employment of aliens within the INA's framework for regulation of immigration—traditionally an area of exclusive federal, not state or local, authority. Indeed, the very law at issue in *De Canas* would now be preempted by Section 1324a.

II. FEDERAL LAW SPECIFIES THAT E-VERIFY IS A VOLUNTARY PROGRAM AND PREEMPTS ARIZONA'S REQUIREMENT TO USE E-VERIFY

The court of appeals concluded that Arizona's requirement that all employers use E-Verify is not impliedly preempted for two reasons: because Congress did not expressly preempt it, Pet. App. 20a, and because Congress "envisioned and endorsed an increase in

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[9] The court of appeals was correct that *Hoffman Plastic Compounds, Inc.* v. *NLRB*, 535 U.S. 137 (2002), did not involve preemption. Pet. App. 16a. Petitioners cited *Hoffman* as an instance in which this Court recognized, albeit in a different context involving the interplay between two *federal* laws, the point made in the text: that since IRCA, it is no longer true that federal immigration law does not speak to employment of unauthorized aliens. See 535 U.S. at 147.

[E-Verify's] usage," *id.* at 21a. Neither reason can sustain the court of appeals' conclusion.

A. Ordinary Principles Of Conflict Preemption Apply

If a state law conflicts with a federal statute, by preventing the federal law from fully attaining Congress's goals or by interfering with the implementation of federal law, the state law is preempted. Contrary to the court of appeals' negative inference from the express preemption clause in Section 1324a—a provision that the E-Verify provisions of IIRIRA did not amend—those conflict-preemption principles apply whether or not the statute contains an express preemption clause and, indeed, whether or not the state law is saved from express preemption. See p. 23, *supra*. Whether the E-Verify requirement is preempted therefore turns on "ordinary * * * principles of conflict pre-emption." *Geier*, 529 U.S. at 874.

B. Congress Has Specified That E-Verify Should Grow Through Voluntary Enrollment, And The Arizona Statute Frustrates That Policy

The court of appeals concluded that the requirement to use E-Verify was not preempted because it did not think that the federal E-Verify statute reflected any congressional intent to "balance federal goals." Pet. App. 20a-21a. Rather, the court concluded that Congress's sole purpose was to encourage and expand E-Verify. That flawed understanding of the E-Verify statute was the basis for the court's erroneous preemption analysis. In fact, Congress has repeatedly specified that participation shall be voluntary, as one means of allowing E-Verify to grow at a measured pace and in a manner that encourages public acceptance, while the

program remains under evaluation, revision, and regular reconsideration by Congress.

1. The statutory text expressly specifies that participation in E-Verify shall be voluntary, with only a few enumerated exceptions

As part of a section entitled "Voluntary election to participate," and a subsection entitled "Voluntary election," Congress specified that employers "*may* elect to participate" in the E-Verify program. IIRIRA § 402(a) (emphasis added). The word "may" by itself suggests a discretionary decision. See, *e.g.*, *Shady Grove Orthopedic Assocs., P.A.* v. *Allstate Ins. Co.*, 130 S. Ct. 1431, 1438 (2010).

Subsection (e) of the "Voluntary election to participate" section, in turn, is entitled "Select entities required to participate in a pilot program." § 402(e). The only entities required to participate are federal employers and a small set of private employers—those that have been found to have violated Section 1324a or 1324b and are ordered by the federal administrative tribunal to participate in E-Verify. *Ibid.* With those specified exceptions, "the Secretary of Homeland Security may not require any person or other entity to participate." § 402(a). By specifying that participation shall generally be voluntary and then enumerating specified exceptions to that rule, Congress underscored its expectation that the general rule—voluntary participation—would apply wherever the express exceptions do not.

Congress also insisted that potential participants be informed that the program is voluntary. IIRIRA requires the Secretary to "widely publicize the [E-Verify] election process * * * including the *voluntary nature* of" the E-Verify program. § 402(d)(2) (emphasis added).

Likewise, the Secretary must designate persons in district offices "to inform persons and other entities that seek information about [E-Verify] of [its] *voluntary nature*." § 402(d)(3)(A) (emphasis added).

In accordance with those required explanations, Congress also specified that employers may limit or terminate their participation as they wish. For instance, employers may opt to participate only in particular States or particular hiring locations. § 402(c)(2)(A). And a participating employer "may terminate [its] election" by following the Secretary's prescribed procedures. § 402(c)(3). Indeed, throughout the statute, Congress repeatedly referred to program participants as "electing" persons or entities and called participation in the program "election." §§ 402(b)(2), (c)(1), (c)(2)(A) and (c)(2)(B), 403(a).[10]

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[10] In 2008, pursuant to his authority under the federal procurement statute, 40 U.S.C. 121(a), President Bush issued Executive Order No. 13,465, 3 C.F.R. 192 (2009), directing federal agencies to "require, as a condition of each contract, that the contractor agree to use an electronic employment eligibility verification system designated by the [Secretary] to verify the employment eligibility of" certain employees. § 3, 3 C.F.R. 193 (2009). The E-Verify program, "modified as necessary and appropriate," was designated as the verification system. 73 Fed. Reg. at 33,837. The Executive Order and the regulation promulgated to enforce it were challenged and were upheld. *Chamber of Commerce* v. *Napolitano*, 648 F. Supp. 2d 726 (D. Md. 2009), appeal voluntarily dismissed, No. 09-2006 (4th Cir. Dec. 14, 2009).

Unlike the Arizona statute, the federal rule requiring use of E-Verify by federal contractors does not fundamentally alter the voluntary nature of the E-Verify program. Federal contractors have, by definition, entered into a voluntary contractual relationship with the government. The agreement to use E-Verify, and fulfill the responsibilities that come

2. *The history of E-Verify confirms that Congress has managed the program's growth by insisting upon voluntary participation*

Voluntary participation is one of several ways in which the scope of E-Verify has been consciously circumscribed since its initial authorization. Congress created the initial Basic Pilot Program with a four-year time limit and a narrow scope, requiring only that it be offered to employers in at least five of the seven States with the highest concentration of unauthorized aliens. IIRIRA § 401(b) and (c)(1), 110 Stat. 3009-655 to 3009-656. Congress has since reauthorized it several times, in carefully circumscribed increments (see note 3,

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with it, becomes part of the larger—voluntary—agreement between government and private contractor. 648 F. Supp. 2d at 735-736.

The government also pointed out that the Executive Order, issued by the President and not by the Secretary, is not contrary to the statutory provision specifying that "the Secretary of Homeland Security may not require any person or other entity to participate in a pilot program." In the course of that discussion, the United States noted that the Arizona statute's E-Verify requirement, too, is not *expressly* foreclosed by Section 402(a). Defs.' Reply Mem. in Supp. of Mot. for Summ. J. at 7, *Chamber of Commerce*, *supra* ("[T]he State of Arizona has required all public and private employers in that State to use E-Verify * * * . This is permissible because the State of Arizona is not the Secretary of Homeland Security.") (citations omitted); see Opp'n to Pls.' Emergency Mot. for Inj. Pending Appeal at 13-14, *Chamber of Commerce* v. *Napolitano*, No. 09-2006 (4th Cir. filed Sept. 6, 2009) (similar). That statement did not address the question here—whether, in light of the entire federal statutory framework, the Arizona requirement, applicable to all employers, is barred by principles of implied conflict preemption (which, of course, do not limit the broad authority over federal contracting *expressly* granted the President by another federal statute). Cf. *Chamber of Commerce* v. *Brown*, 128 S. Ct. 2408, 2418 (2008) (state requirement not saved from preemption merely because federal government imposes analogous, but narrower, requirement).

supra), always with a sunset provision; the program is currently scheduled to expire in 2012 unless further reauthorized. And Congress has never changed the program's expressly voluntary character, although many proposals to make the program mandatory have been introduced. See Pet. Br. 10 n.7. That limitation does not detract from E-Verify's successful track record, which is borne out by findings documenting the system's accuracy and participants' satisfaction.[11] The government continues to encourage more employers to participate. But under the statute as written, the States may not require statewide participation.

The court of appeals relied on the 2003 reauthorization, in which Congress decided to require that voluntary participation be available to employers nationwide. See 2003 Act § 3(a), 117 Stat. 1944 (amending IIRIRA § 401(c)(1)). That reasoning was erroneous. Congress undertook that expansion at a time when it had reservations about mandatory participation; the 2003 expansion, therefore, does not reflect a judgment that any and every measure increasing participation in E-Verify would be appropriate. Nor has Congress since changed the statute in any way, except to extend the program's duration.

In the 2003 legislation to expand E-Verify, Congress made no change to the provisions specifying that employers "may" elect to participate, "may" elect to participate on a limited basis, and "may terminate" their participation. IIRIRA § 402(a), (c)(2) and (c)(3). And Congress noted that a congressionally mandated report on the then-existing Basic Pilot Program's efficacy (see IIRIRA

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[11] See, *e.g.*, Westat, *Findings of the E-Verify Program Evaluation* at xxxi, xxxv-xxxvi (Dec. 2009), http://www.uscis.gov/USCIS/E-Verify/E-Verify/Final%20E-Verify%20Report%2012-16-09_2.pdf (*E-Verify 2009 Report*).

§ 405(a)) had identified "problems," and it directed that the Secretary of Homeland Security further report on whether those problems had been resolved "before undertaking the expansion of the basic pilot program to all 50 States." 2003 Act § 3(b)(2), 117 Stat. 1945 (adding IIRIRA § 405(b)).

The report to which the 2003 Act referred and the history of that legislation confirm that Congress continued to contemplate voluntary participation. Several members of the House Judiciary Committee objected to requiring that E-Verify be available nationwide and contended that the congressionally mandated study supported their position. In response, the proponents of nationwide availability repeatedly emphasized the program's voluntary nature: "What we're talking about here is not a mandatory program, but an expansion of a voluntary program." H.R. Rep. No. 304, 108th Cong., 1st Sess, Pt. 1, at 28 (2003) (Rep. Hostettler); see also *ibid.* (Rep. King of Iowa); *id.* at 31 (Rep. Cannon). The sponsors acknowledged that according to the congressionally mandated study, "expanding [E-Verify] *on a mandatory basis would not be appropriate*" at that time. *Id.* at 29 (Rep. Hostettler) (emphasis added). But, the proponents noted, the study had concluded that the responsible federal agencies could successfully handle a nationwide program "of limited scope," *i.e.*, on a voluntary basis. *Id.* at 28. See generally Institute for Survey Research & Westat, *INS Basic Pilot Evaluation: Summary Report* 41 (Jan. 29, 2002) ("Based on the evaluation findings, the Basic Pilot program should not be expanded to a manda-

tory or large-scale program.") (boldface and italics omitted).[12]

As Congress contemplated, see § 405(b), DHS's consistent work since 2003 to improve the program has resolved many of the concerns previously identified.[13] Congress, however, has not amended the authorizing statute to alter the voluntary nature of participation.

3. Arizona's requirement to participate in E-Verify conflicts with the federal framework

The court of appeals thought that because Congress has expanded E-Verify in "duration and * * * availability," no federal policy would be frustrated if the States were to *mandate* participation. Pet. App. 21a. That reasoning misapprehends the balance that Congress struck in reauthorizing E-Verify, a balance in which voluntary participation is an essential element.

As the foregoing discussion shows, Congress's approach to E-Verify has never been "the more participation, and the sooner, the better." Cf. *Geier*, 529 U.S. at 874 (state tort-law duty requiring the immediate and universal installation of airbags was preempted, because although the responsible agency approved and favored airbags, it had rejected a policy of "the more airbags, and the sooner, the better," in favor of a more measured phase-in approach). Rather, Congress's steps to renew and expand the program have maintained E-Verify's voluntary character and have been incremental, within care-

[12] Debate on the substantially similar Senate bill ultimately adopted, which delayed the required nationwide availability for a year, similarly emphasized that the program was "in no way mandatory." 149 Cong. Rec. 29,763 (2003) (Rep. Calvert); see *id.* at 29,761-29,764 (Reps. Sensenbrenner, Jackson-Lee, Smith of Texas, Osborne) (noting participation was voluntary).

[13] See, *e.g.*, *E-Verify 2009 Report* at xxxii, xxxv, 57-61.

ful limits. Permitting the States to require *all* employers to participate would upset the balance that Congress struck.

The court of appeals further erred in suggesting (Pet. App. 20a) that congressional silence could be read as permission for the States to require private employers to enter into contracts *with the federal government*, pursuant to which federal agencies commit to provide the employer with certain services. See *The E-Verify Program for Employment Verification Memorandum of Understanding* 1-3, http://www.uscis.gov/files/nativedocuments/MOU.pdf (Oct. 29, 2008) (formal agreement between DHS and each participating employer). In many instances participation requirements imposed by state or local governments may overload otherwise elective federal programs and thus frustrate Congress's intent—although DHS advises in this case that the E-Verify system can accommodate the increased use that the Arizona statute and existing similar laws would create. But the court of appeals did not rely on any such practical considerations specific to E-Verify, and the *general* interpretive principle should be that, absent a clearer indication than present here, federal statutes of this kind should not be understood to allow States to impose such burdens on federal programs. "[T]he relationship between a federal agency and the entity it regulates is inherently federal in character because the relationship originates from, is governed by, and terminates according to federal law." *Buckman*, 531 U.S. at 347.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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AMICUS CURIAE BRIEF

No. 09-115

IN THE

Supreme Court of the United States

CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA, ET AL., *Petitioners*,

v.

MICHAEL B. WHITING et al., *Respondents*.

On Writ of Certiorari to the
United States Court of Appeals for the Ninth Circuit

AMICUS CURIAE BRIEF OF THE AMERICAN CENTER FOR LAW AND JUSTICE IN SUPPORT OF RESPONDENTS

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OTHER MATERIALS

Arizona State University, The Morrison Institute for Public Policy, Illegal Immigration: Perceptions and Realities (2010) ... 11-12
Ed Barnes, *Cost of Illegal Immigration Rising Rapidly in Arizona*, FOXNews.com (May 17, 2010), http://www.foxnews.com/us/2010/05/17/immigration-costs-rising-rapidlty-new-study-says/ ... 12
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Center for Immigration Studies (Apr. 2010), http://www.cis.org/announcement/AZ-immigration-SB1070 13-14
Steven A. Camarota & Jessica Vaughan, *Immigration and Crime: Assessing a Conflicted Issue*, Center for Immigration Studies (Nov. 2009), http://www.cis.org/ImmigrantCrime..... 13
Susan Carroll, *Feds Moving to Dismiss Some Deportation Cases*, HOUSTON CHRONICLE, (Aug. 24, 2010), http://www.chron.com/disp/story.mpl/metropolitan/7169978.html. 9
Erwin Chemerinsky, *Empowering States When It Matters: A Different Approach to Preemption*, 69 Brook. L. Rev. 1313 (2004) 4
Congressional Budget Office, The Impact of Unauthorized Immigrants on the Budgets of State and Local Governments (2007)..... 10-11
Federation for American Immigration Reform, The Costs of Illegal Immigration to Arizonans: Executive Summary (2004) 12-13
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Jessica Vaughan, *ICE Chief Morton to Field: See No Illegal Aliens*, Center for Immigration Studies,

(Aug. 19, 2010), http://cis.org/vaughan/see-no-illegal-aliens 9-10
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INTEREST OF AMICUS*

The American Center for Law and Justice (ACLJ) is an organization dedicated to the defense of constitutional liberties secured by law. ACLJ attorneys have appeared frequently before this Court as counsel for parties or for amici.

The proper resolution of this case is a matter of concern to the ACLJ because of its dedication to constitutional principles of federalism.

SUMMARY OF THE ARGUMENT

Although this preemption case presents narrow statutory interpretation issues—requiring the Court to divine Congress's intent in the absence of clear statutory terms—it implicates fundamental principles of federalism for two reasons. First, illegal immigration is a serious problem, which uniquely and profoundly affects the states, particularly border states like Arizona. The federal government has proved inadequate to the tasks of enforcing current immigration laws and building consensus toward

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* The parties have filed with the Court their written consent to the filing of all briefs amicus curiae in this case. No counsel for any party in this case authored this brief in whole or in part. No person or entity aside from the ACLJ, its members, or its counsel made a monetary contribution to the preparation or submission of this brief. The ACLJ has no parent corporation, and no publicly held company owns 10% or more of its stock.

needed immigration reform. The issue has been mired in partisan politics, and the states have been left to cope on their own.

Second, for the past quarter century, but especially since September 11, 2001, Congress has welcomed, and in fact highly depends on, state and local assistance in enforcing federal immigration laws. Whatever Congress may have intended by the savings clause of 8 U.S.C. § 1324a(h)(2)—and that is not clear—national immigration policy now favors concurrent federal/state authority to enforce federal immigration laws. State laws, like the Legal Arizona Workers Act, that mirror federal immigration provisions and incorporate federal standards promote national policy and should not be preempted. No national interest is furthered by sustaining preemption claims such as those in this case, where small discrepancies exist between state and federal enforcement provisions. Conversely, needless damage to state sovereignty, and to state and local efforts to combat the ills associated with illegal immigration, will result.

ARGUMENT

I. FEDERALISM CONCERNS SHOULD PLAY A SIGNIFICANT ROLE IN EVALUATING PREEMPTION CLAIMS AGAINST STATE LAWS THAT ENFORCE FEDERALLY ESTABLISHED STANDARDS PERTAINING TO ILLEGAL ALIENS.

The Constitution is structured so that "States possess sovereignty concurrent with that of the Federal Government, subject only to limitations imposed by the Supremacy Clause." *Tafflin v. Levitt*, 493 U.S. 455, 458 (1990).

> This federalist structure of joint sovereigns preserves to the people numerous advantages. It assures a decentralized government that will be more sensitive to the diverse needs of a heterogeneous society; it increases opportunity for citizen involvement in democratic processes; it allows for more innovation and experimentation in government; and it makes government more responsive by putting the States in competition for a mobile citizenry.

Gregory v. Ashcroft, 501 U.S. 452, 458 (1991) (*citing* Michael McConnell, *Federalism: Evaluating the Founders' Design*, 54 U. Chi. L. Rev. 1484, 1491–1511 (1987)).

The Founders established the federalist system "to ensure the protection of 'our fundamental

liberties.'" *Atascadero State Hosp. v. Scanlon*, 473 U.S. 234, 242 (1985). Although the Supremacy Clause, U.S. Const. art. VI, cl. 2, confers "a decided advantage" to the federal government, the power to preempt state laws is "*an extraordinary power* . . . [that the Court] *assume[s] Congress does not exercise lightly.*" *Gregory*, 501 U.S. at 460 (emphasis added). To sum up in Justice Breyer's words, "the true test of federalist principles" comes in preemption cases. *Egelhoff v. Egelhoff (ex. rel Breiner)*, 532 U.S. 141, 160 (2001) (Breyer, J., dissenting).

Federalism concerns are at their apex when federal law intrudes in an area of traditional state sovereignty. *Gregory*, 501 U.S. at 457–58. This principle extends to cases in which preemption is asserted against a state's exercise of its police powers to address severe problems unique to that state. *DeCanas v. Bica*, 424 U.S. 351, 357 (1976). In the realm of illegal immigration control, preempting state laws that mirror federal standards but provide slightly different enforcement mechanisms eviscerates the states' ability to "make choices that are responsive to their residents' desires, to experiment, and to advance liberty and freedom within their boundaries." Erwin Chemerinsky, *Empowering States When It Matters: A Different Approach to Preemption*, 69 Brook. L. Rev. 1313, 1326 (2004) ("a broad vision of inferred preemption invalidates beneficial state laws."); *see also* Peter H. Schuck, *Immigration Law and Policy: Taking Immigration Federalism Seriously*, 2007 U. Chi. Legal F. 57, 80 (2007); S. Candice Hoke, *Preemption*

Pathologies and Civic Republican Values, 71 B.U. L. Rev. 685, 697 (1991).

A. The Legal Arizona Workers Act Is A Valid Exercise of Arizona's Police Powers, and the Assumption Against Preemption Should Apply.

The authority to bar employment of illegal aliens "is certainly" within Arizona's police power. *DeCanas*, 424 U.S. at 356. Thus, when Congress passed the Immigration Reform Control Act provisions making it unlawful for employers "to hire, recruit or refer for a fee . . . an alien knowing the alien is an unauthorized alien" or "to continue to employ . . . an unauthorized alien" 8 U.S.C. § 1324a(a)(1)–(2), [1] it trenched upon an area of traditional state sovereignty. Pursuant to its power under the Supremacy Clause, Congress included an express preemption clause but carved out an area of continuing state authority over the employment of illegal aliens. Section 1324a(h)(2) allows states to sanction "through licensing and similar laws" employers who employ unauthorized aliens.

Accordingly, with the savings clause of §1324a(h)(2) in mind, Arizona in 2007 passed the Legal Arizona Workers Act ("LAWA"). LAWA is one of numerous state laws that attempt to provide state

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[1] An unauthorized alien is one who is either not lawfully admitted for permanent residence or not authorized to be employed by IRCA or the U.S. Attorney General. 8 U.S.C. § 1324a(h)(3).

enforcement of federal immigration laws that are otherwise ineffectually enforced.[2]

LAWA authorizes Arizona courts to suspend or revoke the business licenses of employers who knowingly or intentionally hire unauthorized aliens. Ariz. Rev. Stat. § 23-212 (2010).[3] The Act defines business licenses to include "any agency permit, certificate, approval, registration, charter or similar form of authorization that is required by law and that is issued by any agency for the purposes of operating a business in this state." *Id.* § 23-211(9)(a).

LAWA grants the state authority to enforce essentially federal law provisions. The Act incorporates the federal definition of "unauthorized alien," *see id.* § 23-211(11), and requires Arizona courts to adopt the federal government's determination of the employee's lawful status. *Id.* § 23-212(H).

Additionally, LAWA requires Arizona employers to use E-Verify, a federal Internet database that maintains current records on aliens' work

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[2] In 2008, thirteen states enacted nineteen laws regulating the employment of immigrants. State Laws Related to Immigrants and Immigration in 2008, Immigration Policy Project (Dec. 18, 2008). In 2009, twelve states enacted twenty one laws regulating the employment of immigrants. State Law Related to Immigrants and Immigration in 2009, Immigration Policy Project (Dec. 1, 2009).

[3] The Act provides further that any person may submit a complaint to the Arizona Attorney General or a county attorney. Ariz. Rev. Stat. Ann. § 23-212(B). An appropriate county attorney may bring an action against the employer in superior court. *Id.* § 23-212(C), (D).

authorization status. LAWA imposes no sanctions, however, for employers who refuse. The federal government encourages, but does not mandate, use of E-Verify. 8 U.S.C. § 1324a(d).

As is true in most close preemption cases, Congress's intent with respect to the scope of the savings clause in §1324a(h)(2) is murky. Congress did not specifically define the phrase "licensing and similar laws," and the legislative history sheds little light on the issue raised in this case. *See Chicanos Por La Causa, Inc. v. Candelaria*, 558 F.3d 856, 864 (9th Cir. 2009).

It is accordingly imperative that the Court faithfully apply the federalist principle of presumption against preemption in interpreting the savings clause in §1324a(h)(2). "In all preemption cases, and particularly in those in which Congress has 'legislated . . . in a field which the States have traditionally occupied,'" the Court assumes that the "'historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress.'" *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 485 (1996) (*quoting Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947)); *Egelhoff v. Egelhoff*, 532 U.S. 141, 157 (2001) (Breyer, J., dissenting) ("the true test of federalist principle[s]" comes in preemption cases in which statutory terms are unclear). *See generally* Ernest Young, *Federal Preemption and State Autonomy*, *in* Richard Epstein & Michael Greve, *Federal Preemption: States' Powers, National Interests* 262, 262 (AEI 2007) (arguing that where Congressional

intent is unclear, the presumption against preemption should always control.)

That presumption extends to savings clauses within express preemption provisions. *Rush Prudential HMO, Inc. v. Moran*, 536 U.S. 355, 365 (2002), *overruled on other grounds, Ky. Ass'n of Health Plans, Inc. v. Miller*, 538 U.S. 329 (2003).

B. The Federalist Presumption Against Preemption Should Control Where A Few States Shoulder A Disproportionate Share of the Social and Economic Costs of Illegal Immigration, And The Federal Government Either Cannot Or Will Not Address The Problem.

Congress has plenary power over immigration, and sets federal immigration policy. *INS v. Chadha*, 462 U.S. 919, 940 (1983). The Executive Branch's enforcement policy does not trump Congressional objectives because where Congress exercises plenary power to prescribe laws, the Executive must follow Congress's direction. *See, e.g., Zadvydas v. Davis*, 533 U.S. 678, 696–99 (2001) (holding the Attorney General had no power to detain aliens indefinitely because that power conflicted with 8 U.S.C. § 1231(a)(6)).

Notwithstanding Congress's immigration policy objectives, the Executive Branch's lassitude toward immigration law enforcement is well-documented. For example, the Department of Homeland Security is now "reviewing thousands of pending immigration cases and moving to dismiss those filed against

suspected illegal immigrants who have no serious criminal records . . . ." Susan Carroll, *Feds Moving to Dismiss Some Deportation Cases*, Houston Chronicle, Aug. 24, 2010, http://www.chron.com/disp/story.mpl/metropolitan/7169978.html.

Additionally, although Congress intended state and local officers to have an expanded role in immigration enforcement after receiving permission and training from the federal government through a Memorandum of Understanding pursuant to the "287(g)" program,[4] the Administration has limited both federal and local officers' authority to arrest illegal aliens who are discovered during traffic stops. The new ICE policy seeks to curtail an officer's authority under the 287(g) program: "'Immigration officers shall not issue a detainer unless an LEA [law enforcement agency] has exercised its independent authority to arrest the alien. Immigration officers shall not issue detainers for aliens who have been temporarily detained by the LEA (i.e. roadside or *Terry* stops) but not arrested.'" Jessica Vaughan, *ICE Chief Morton to Field: See No Illegal Aliens*, Center for Immigration Studies, (Aug 19, 2010), http://cis.org/vaughan/see-no-illegal-aliens (*quoting*

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[4] *See* 8 U.S.C. § 1357(g)(1) (2006). Local law enforcement officers have inherent authority to arrest and detain illegal aliens when ICE confirms that the aliens are unlawfully present. *See United States v. Soriano-Jarquin*, 492 F.3d 495, 501 (4th Cir. 2007). Additionally, Congress expanded the role that state and local officers can have in immigration enforcement after receiving permission and training from the federal government through a Memorandum of Understanding pursuant to the "287(g)" program. *See* 8 U.S.C. § 1357(g)(1) (2006).

ICE Draft Policy, *available at* http://www.cis.org/articles/2010/ice-draft-080110.pdf). Vaughan summed up the new policy: "all illegal aliens who violate traffic laws will get a free pass from ICE, unless they also happen to have committed other 'real' crimes." *Id.*

Federal enforcement of Section 1324 provisions barring the employment of illegal aliens is similarly anemic. Randall G. Shelley Jr., *If You Want Something Done Right . . . :* Chicanos por la Causa v. Napolitano *and the Return of Federalism to Immigration Law*, 43 Akron L. Rev. 603, 603–04 (2010).

In addition to lax enforcement of immigration policy, the federal government refuses to secure the border with Mexico, and it is the border states that bear much of the social and economic costs resulting from the federal government's failure to effectively address illegal immigration.

As one scholar pointed out, most tax revenues generated by illegal immigrants flow to the federal government, while almost all the costs, including those borne by locally funded social services and illegal immigrant crime, accrue to the states. Peter H. Schuck, *Immigration Law and Policy: Taking Immigration Federalism Seriously*, 2007 U. Chi. Legal F. 57, 80 (2007).

A 2001 report by United States/Mexico Border Counties Coalition showed that law enforcement activity involving illegal immigrants in four states (California, Arizona, New Mexico, and Texas) cost some county governments on the border a combined total of $108 million in 1999. Congressional Budget

Office, The Impact of Unauthorized Immigrants on the Budgets of State and Local Governments 9 (2007) [hereinafter CBO Report], *available at* http://www.cbo.gov/ftpdocs/87xx/doc8711/12-6 Immigration.pdf. Furthermore, a report that focused primarily on the "Costs of Uncompensated Care in Southwest Border Counties" and surveying seventeen border counties in California, Arizona, New Mexico, and Texas determined that nearly $190 million of "uncompensated [medical] costs" was due to "undocumented immigrants." MGT of America, Medical Emergency: Costs of Uncompensated Care in Southwest Border Counties 30, *available at* http://www.bordercounties.org/vertical/Sites/%7BB4A 0F1FF-7823-4C95-8D7A-F5E400063C73%7D/uploa ds/%7BFAC57FA3-B310-4418-B2E7-B68A89976DC 1%7D.PDF. A 2007 Heritage Foundation study showed that while low-skill immigrant households received over $30,000 per household in 2004 in immediate government benefits, the same households only paid $10,573 in taxes. Robert Rector & Christine Kim, *The Fiscal Cost of Low-Skill Immigrants to the U.S. Taxpayer*, The Heritage Foundation (2007), http://s3.amazonaws. com/thf_media/2007/pdf/sr14.pdf. These households, which were used as a surrogate for illegal immigrant households, received nearly three dollars in benefits for each dollar in taxes paid. *Id.*

The Office of Immigration Statistics estimated that in 2009, 460,000 illegal aliens resided in Arizona. Arizona State University, The Morrison Institute for Public Policy, Illegal Immigration: Perceptions and Realities 2 (2010), *available at*

http://morrisoninstitute.asu.edu/publications-reports/2010-illegal-immigration-perceptions-and-realities1. In a 2004 study, the Federation for American Immigration Reform estimated that Arizona's illegal immigrant population was costing the state's taxpayers approximately $1.3 billion per year in education, medical care, and incarceration alone, Federation for American Immigration Reform, The Costs of Illegal Immigration to Arizonans: Executive Summary 1 (2004) [hereinafter Federation for American Immigration Reform], *available at* http://www.fairus.org/site/DocServer/azcosts2.pdf?docID=101, or approximately $700 annually per Arizona taxpaying household. *Id.* More recent figures by FAIR in 2009 suggest that the annual cost of illegal immigration in Arizona has risen to at least $2.7 billion annually. Ed Barnes, *Cost of Illegal Immigration Rising Rapidly in Arizona*, FOXNews.com (May 17, 2010), http://www.foxnews.com/us/2010/05/17/immigration-costs-rising-rapidlty-new-study-says/. This cost includes $1.6 billion for educating children of illegal aliens, $694.8 million in health care services for illegal aliens, and $339.7 million in law enforcement and court costs. *Id.*

In addition to these quantifiable costs, Arizona also incurs a number of non-quantifiable costs, including: preventing and enforcing crimes committed by illegal aliens; providing an array of services in Spanish interpretation and translation, especially in the health care, law enforcement, and judicial systems; tuition subsidies to illegal immigrants who enroll in Arizona's higher education institutions; increased insurance rates associated

with illegal immigration-related crimes; and lost earnings by U.S. citizens or legal residents. Federation for American Immigration Reform, at 4.

A study released by the Center for Immigration Studies, relying upon federal law enforcement data, showed that in 2004, 11.1% of Arizona's state prison population was undocumented or "illegal," compared to 7% of the overall state population that is illegal. Steven A. Camarota & Jessica Vaughan, *Immigration and Crime: Assessing a Conflicted Issue*, Center for Immigration Studies (Nov. 2009), http://www.cis.org/ImmigrantCrime. In 2005, a Government Accountability Office study showed that most arrests of illegal aliens occurred in Arizona, California, and Texas, the three largest border states. *Border States Deal with More Illegal Immigrant Crime than Most, Data Suggest*, FoxNews.com, http://www.foxnews.com/politics/2010/04/29/border-states-dealing-illegal-immigrant-crime-data-suggests/ (last visited Oct. 20, 2010). Sampling a prison population of more than 55,000 illegal immigrants, the study found that 80% of the arrests occurred in those three states. *Id.* *see also* U.S. Gov't Accountability Office, GAO-05-646R, Information on Certain Illegal Aliens Arrested in the United States (2005), *available at* http://www.gao.gov/htext/d05646r.html (stating that Arizona was responsible for 8% of these arrests).

In Arizona's Maricopa County, the Attorney's Office has found that illegal aliens committed 22% of all felonies in the county, though illegal aliens comprise only 10% of Maricopa County's adult population. Steven A. Camarota, *Center for*

Immigration Studies on the New Arizona Immigration Law, SB1070, Center for Immigration Studies (Apr. 2010), http://www.cis.org/announcement/AZ-immigration-SB1070

This Court recognized in *Plyler v. Doe*, 457 U.S. 202 (1982), that "unchecked unlawful migration might impair the State's economy generally, or the State's ability to provide some important service." *Id.* at 228 n.23. Also, the Court could not "conclude that the States are without any power to deter the influx of persons entering the United States against federal law, and whose numbers might have a discernible impact on traditional state concerns." *Id.* State sovereignty is most undermined when the states are left to "the mercy of the Federal Government," and deprived of "their opportunities to experiment and serve as 'laboratories.'" *Garcia* v. *San Antonio Metro. Transit Auth.*, 469 U.S. 528, 567 n.13 (1985) (Powell, J., dissenting). The border states are being left to the mercy of the federal government in the realm of illegal immigration. The federalist presumption against preemption is clearly warranted.

II. STATE IMMIGRATION LAWS THAT ENFORCE FEDERALLY ESTABLISHED STANDARDS PROMOTE NATIONAL IMMIGRATION POLICY AND SHOULD NOT BE PREEMPTED.

LAWA promotes federal policy against employers hiring unauthorized aliens. It does so within the scope of the savings clause of §1324a(h)(2). Where state laws regulating illegal aliens mirror federal

objectives and reinforce federal policy, preemption claims must fail. *Plyler v. Doe*, 457 U.S. 202, 225 (1982); *De Canas v. Bica*, 424 U.S. 351, 361 (1976).

Petitioner's cramped and unsubstantiated interpretation of the phrase "licensing and similar laws" does not further federal immigration policy. Rather, holding LAWA preempted would serve only to perpetuate a policy of ineffective enforcement, even though Congress has made clear that the federal government needs the states' assistance in enforcing the nation's immigration's laws. Federal immigration law has shifted its focus from "foreign affairs and national identity to a seemingly domestic issue, touching on central areas of state concern." Juliet P. Stumpf, *States of Confusion: The Rise of State and Local Power Over Immigration*, 86 N.C.L. Rev. 1557, 1595 (2008).

Congress has passed numerous acts illustrating the clear and manifest intent to welcome state involvement in immigration control. Congress has expressed its intent not to preempt state cooperation by (1) expressly reserving inherent state authority in immigration law enforcement (8 U.S.C. § 1357(g)(10) (2006)), (2) banning sanctuary policies that interfere with exercising that authority (8 U.S.C. §§ 1373(a)-(b), 1644 (2006)),[5] (3) requiring federal officials to respond to state inquiries (8 U.S.C. § 1373(c)), (4) simplifying the process for making such inquiries (Law Enforcement Support Center ("LESC")), (5)

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[5] *See also City of New York v. United States*, 179 F.3d 29, 31-32 (2d Cir. 1999) (upholding constitutionality of law banning sanctuary policies).

deputizing state and local officers as immigration agents (8 U.S.C. § 1357(g)(1) (2006)), and (6) compensating states that assist (8 U.S.C. § 1103(a)(11) (2006)).

To ensure cooperation by federal officials, Congress *required* immigration authorities to respond to state and local inquiries seeking to "verify or ascertain the citizenship or immigration status of any individual . . . ." 8 U.S.C. § 1373(c). Congress had already begun allocating funds to create the LESC, which is now the primary point of contact between state officers and federal immigration agents for verifying immigration status.

In 1996, Congress also enacted 8 U.S.C. § 1357(g)(1), which allowed state and local officers to be deputized as immigration agents. This congressionally-delegated authority is distinct from an officer's inherent authority to inquire into immigration status and arrest for immigration violations. Kris W. Kobach, *Reinforcing the Rule of Law: What States Can and Should Do to Reduce Illegal Immigration*, 22 Geo. Immigr. L.J. 459, 478 (2008). *See also United States v. Vasquez-Alvarez*, 176 F.3d 1294 (10th Cir. 1999); *United States v. Contreras-Diaz*, 575 F.2d 740, 743-45 (9th Cir. 1978).

Congress has also used its spending power, U.S. Const. art. I, §8, cl. 1, to support cooperative immigration enforcement by appropriating federal funds for state and local governments that assist in enforcing immigration laws. 8 U.S.C. § 1103(a)(11).

Finally, the Executive Branch itself has encouraged concurrent immigration enforcement. In 1996, the Justice Department's Office of Legal

Counsel ("OLC") supported state and local enforcement of criminal INA provisions and also concluded that state and local officers could detain aliens for registration law violations. 20 Op. O.L.C. 26, 29, 37 (1996).

Since 2001, the Justice Department has entered warrants ("detainers") for civil immigration violations into the National Crime Information Center database ("NCIC"), available nationally to state and local officers. Kris W. Kobach, *The Quintessential Force Multiplier: The Inherent Authority of Local Police to Make Immigration Arrests*, 69 Alb. L. Rev. 179, 191 (2005). In 2002, a revised OLC memo dropped the "criminal law enforcement only" limitation and analyzed the statutes and cases expressing and recognizing Congress's intent to allow broad concurrent enforcement. Memorandum from Jay S. Bybee, Assistant Attorney Gen., Office of Legal Counsel, for the Attorney Gen., Re: Non-preemption of the Authority of State and Local Law Enforcement Officials to Arrest Aliens for Immigration Violations 5–8 (Apr. 3, 2002).

Where Congress legislates in fields of traditional state regulation, courts will not find federal preemption unless that was Congress's clear and manifest purpose, or the state statute does "'*major damage' to 'clear and substantial' federal interests . . . .*" *Hisquierdo v. Hisquierdo*, 439 U.S. 572, 581, (1979) (*quoting United States v. Yazell*, 382 U.S. 341, 352 (1966) (emphasis added).

LAWA does no damage to federal immigration policy. It is consistent with the federal government's

policy of concurrent enforcement of federal immigration laws. Provided state enforcement laws track federal standards, minor discrepancies in enforcement mechanisms should not defeat the presumption against preemption warranted when states exercise their police power to address a problem of profound state concern.

CONCLUSION

Amicus respectfully requests this Court to affirm the judgment of Court of Appeals for the Ninth Circuit.

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AMICUS CURIAE BRIEF

Nos. 09-115

In the

Supreme Court of the United States

CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA *ET AL.*,
PETITIONERS,

v.

MICHAEL B. WHITING, *ET AL.*,
RESPONDENTS.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Brief of the American Unity Legal Defense Fund As *Amicus Curiae* Supporting Respondents and Affirmance

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Questions Presented

1. Whether federal law expressly preempts Arizona's law authorizing sanctions against licenses of employers that knowingly or intentionally employ unauthorized aliens when 8 U.S.C. § 1324a(h)(2) specifically preserves state sanctions "through licensing and similar laws."

2. Whether Arizona's law authorizing licensing sanctions against an employer is impliedly preempted by federal law even though the sanctions are within the savings clause in 8 U.S.C. § 1324a(h)(2) and Arizona's law is otherwise consistent with IRCA.

3. Whether Arizona's statute requiring employers within the State to use the federal E-Verify program to confirm that new employees are legally authorized to work in this country is impliedly preempted because Congress has not mandated the use of this federal program nationally.

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Ariz. Contractors Ass'n v. Candelaria, 534 F.Supp.2d 1036 (D.Ariz. 2008) 8, 39
Baker v. IBP, Inc., 357 F.3d 685 (7th Cir.), *cert. denied*, 543 U.S. 956 (2004) 7
Bureau of Alcohol, Tobacco and Firearms v. Federal Labor Relations Authority, 464 U.S. 89 (1983) ... 37
Chamber of Commerce v. Edmondson, 594 F.3d 742 (10th Cir. 2010) 15
Commercial Cleaning Services, L.L.C. v. Colin Service Systems, Inc., 271 F.3d 374 (2d Cir. 2001) 8
De Canas v. Bica, 424 U.S. 351 (1976) ..... *passim*
Edwards v. Prime, Inc., 602 F.3d 1276 (11th Cir. 2010) 22
Fla. Lime & Avocado Growers, Inc. v. Paul, 373 U.S. 132 (1963) 13, 38
Hines v. Davidowitz, 312 U.S. 52 (1941) 13
Hoffman Plastic Compounds, Inc. v. NLRB, 535 U.S. 137 (2002) 7
I.N.S. v. National Center for Immigrants' Rights, Inc. 502 U.S. 183 (1991) 9, 14
Incalza v. Fendi N. Am., Inc., 479 F.3d 1005 (9th Cir. 2007) 36
Lorillard Tobacco Co. v. Reilly, 533 U.S. 525 (2001) 13
Lozano v. City of Hazelton, __ F.3d __, 2010 WL 3504538 (3rd Cir. Sept. 9, 2010) 15

Mendoza v. Zirkle Fruit Co., 301 F.3d 1163 (9th Cir. 2002) 8, 26
Nat'l Ctr. For Immigrants' Rights, Inc. v. INS, 913 F.2d 1350 (9th Cir. 1990), *rev'd*, 502 U.S. 183 (1991) 14
NLRB v. Brown, 380 U.S. 278 (1965) 38
Pennsylvania v. Nelson, 350 U.S. 497 (1956) 38
Plyler v. Doe, 457 U.S. 202 (1982) 37
Sprietsma v. Mercury Marine, 537 U.S. 51 (2002) ... 29
Sure-Tan, Inc. v. NLRB, 467 U.S. 883 (1984) 7
Tafflin v. Levitt, 493 U.S. 455 (1990) 26
Toll v. Moreno, 458 U.S. 1 (1982) 39
Trollinger v. Tyson Foods, Inc., 370 F.3d 602 (6th Cir. 2004) 8
U.S. v. Evans, 333 U.S. 483 (1948) 22
U.S. v. Kim, 193 F.3d 567 (2nd Cir., 1999) 23
U.S. v. Turkette, 452 U.S. 576 (1981) 25
U.S. v. Ye, 588 F.3d 411 (7th Cir. 2009) 23
U.S. v. Zheng, 306 F.3d 1080 (11th Cir., 2002) 23
Williams v. Mohawk Industries, 411 F.3d 1252 (11th Cir. 2005), *certiorari* dismissed, after oral argument, as improvidently granted, 547 U.S. 516 (2006) 7, 25
Williams v. Mohawk Industries, 465 F.3d 1277 (11th Cir. 2006), *cert. denied*, 127 S.Ct. 1381, 167 L.Ed.2d 174 (Feb 26, 2007) 26
Wyeth v. Levine, __ U.S. __, 129 S.Ct. 1187 (2009) .. 38
Zavala v. Walmart Stores, Inc., 393 F.Supp.2d 295 (D.N.J. 2005) 27

8 U.S.C. § 1324 ..... *passim*
8 U.S.C. § 1324(a)(1)(B) 26
8 U.S.C. § 1324(a)(1)(A)(iii) 22
8 U.S.C. § 1324(a)(3)(A) 26
8 U.S.C. § 1324a ..... *passim*

8 U.S.C. § 1324a(h)(2) ..... i, 13
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8 U.S.C. § 1357(g) 25
18 U.S.C. §§ 1961-1968 25
18 U.S.C. § 1961(1)(F) 25
The Immigration Reform and Control Act of 1986, Pub.L. No. 99-603, 100 Stat. 3359, (1986) . *passim*
Omnibus Consolidated Appropriations Act, 1997, Pub.L. 104-208 (1996) 26
The Organized Crime Control Act of 1970, Pub.L. 91-452, 84 Stat. 941 (1970) 25

H.R. Rep. 98-115(I) (1983) 18, 19, 37
H.R. Rep. 98-115(II) (1983) 18
H.R. Rep. 99-115(I) (1985) .....
H.R. Rep. 99-682(I) 19, 20, 21
H.R. Rep. 104-469 (1995) 24
H.R. Rep. 104-725 (1996) (Conf. Rep.) 24, 29
Immigration Reform and Control Act of 1985: Hearings Before the Subcommittee on Immigration, Sen. Cmte on the Judiciary, S. Hrg. 99-273, Serial No. J-99-35, 99th Cong. (1985) 18, 21
S. Rep. 98-62 (1983) 19, 24, 25
S. Rep. 99-132 (1985) ..... *passim*
131 CONG. REC. S7039 (May 23, 1985) 16, 19
141 CONG. REC. H1590 (Feb. 10, 1995) 27, 34

N.C. Aizenman, "Bush Moves to Step Up Immigration Enforcement, *Washington Post*, August 11, 2007, A1, Available at www.washingtonpost.com/wp-dyn/content/article/2007/08/10/AR2007081001113_pf.html 5
Associated Press, "Walmart Mops Up Immigrant Flap," CBS News.com, March 18, 2005,

www.cbsnews.com/stories/2005/03/18/national/main681593.shtml (Last checked on October, 19, 2010) 7

Michael Barbero, "Walmart to Pay $11 Million," *The Washington Post*, March 19, 2005, E01, Available at www.washingtonpost.com/ac2/wp-dyn/A48612-2005Mar18 6

George J. Borjas, "The Labor Demand Curve *Is* Downward Sloping: Re-examining the Impact of Immigration on the Labor Market," 18 *Quarterly Journal of Economics*, no. 4 (2003), 1335 35

Steven Cammarota, *Business and Labor on Immigration: Contrasting Views of Leaders vs. Rank and File*, Center for Immigration Studies, Feb. 2010, www.cis.org/Business-Union-Poll 3

Steven Camarota, *Dropping Out: Immigrant Entry and Native Exit From the Labor Market 2000-2005*, Center for Immigration Studies, 2006, www.cis.org/node/264 35

Steven Camarota, *From Bad to Worse: Unemployment and Underemployment Among Less-Educated U.S.-Born Workers, 2007 to 2010*, Center for Immigration Studies, Aug. 27, 2010, www.cis.org/bad-to-worse 35

CNNMoney.com, "Police: Walmart Site Raided," Nov. 19, 2005, http://money.cnn.com/2005/11/18/news/fortune500/walmart_raid/index.htm (Last checked on October 19, 2010) 7

Congressional Budget Office, *The Role of Immigrants in the U.S. Labor Market*, November 2005, www.cbo.gov/ftpdocs/87xx/doc8711/12-6-Immigration.pdf (Last checked on October 19, 2010) 35

Congressional Research Service ("CRS"), *Immigration Enforcement Within the United States*, April 6, 2006, CRS RL 33351, www.dtic.mil/cgi-bin/GetTRDoc?AD=ADA462178&Location=U2&doc=GetTRDoc.pdf 30, 31

Stephen Dinan, "More Criminal Aliens Deported Last Year," *The Washington Times*, Oct. 7, 2010, A1, Available at www.washingtontimes.com/news/2010/oct/6/more-criminal-aliens-deported-last-year/ 3

Essential Worker Immigration Coalition, "Why A Mandatory Return, 'Report To Deport,' Policy Is Not The Best Option," undated, www.ewic.org/index.php?option=com_content&task=view&id=47&Itemid=9 (Last checked on October 19, 2010) 4

Miriam Jordan, "Arizona Squeeze on Immigration Angers Business," *Wall Street Journal*, Dec. 14, 2007, B1, Available at www.azcentral.com/arizonarepublic/business/articles/1214biz-ArizImmigration1214-ON.html 5

Miriam Marcus, "Pilgrim's Pride Plucked in Immigration Raids," *Forbes*, April 16, 2008, www.forbes.com/markets/2008/04/16/pilgrims-pride-immigrant-markets-equity-cx_mlm_0416market36.html 4

Stephanie McCrummen, "In Arizona, Stark Choices," *The Washington Post*, Oct. 10, 2010, A1, Available at www.washingtonpost.com/wp-dyn/content/article/2010/10/09/AR2010100904406.html 22

Morgan Lee, "Immigration Agents Raid Otay Mesa Bakery," *San Diego Union-Tribune*, October 14, 2010,

www.signonsandiego.com/news/2010/oct/14/immigration-agents-raid-san-diego-bakery/ 22

Office of Public Affairs, U.S. Immigration and Customs Enforcement, "ICE, Walmart Reach $11 Million Settlement", *Inside ICE,* March 18, 2005, ("ICE News Release"), www.millerlawoffices.com/publications/Employers/ICE%20Wal-Mart%203.18.2005.pdf (Last checked on October 19, 2010)..... 6, 7

President Barack Obama, *Remarks by the President on Comprehensive Immigration Reform*, July 1, 2010, www.whitehouse.gov/the-press-office/remarks-president-comprehensive-immigration-reform 29, 33

Julia Preston, "Immigration Agency Ends Some Deportations," *The New York Times*, Aug. 27, 2010, A14, Available at www.nytimes.com/2010/08/27/us/27immig.html 33

Jerry Seper, "Lack of resources curtails ICE tracking of illegals," *The Washington Times*, Aug. 8, 2010, A1, Available at www.washingtontimes.com/news/2010/aug/8/lack-of-resources-curtails-ice-tracking-illegals 33

Jerry Seper, "Walmart Pays $11 Million to Settle Alien Case," *The Washington Times*, March 19, 2005, www.washingtontimes.com/news/2005/mar/18/20050318-104421-2951r/ 6, 7

Elissa Silverman, "Pay Fight in Tech's Trenches; Day Laborers for a Verizon Subcontractor Say They Were Cheated," *The Washington Post*, Feb. 16, 2006, D1, Available at www.washingtonpost.com/wp-dyn/content/article/2006/02/15/AR2006021502499.html 27

Chris Strohm, "DHS Calls on Corporations to Come Clean on Hiring Illegal Immigrants," *GovExec.com Daily Briefing*, March 18, 2005, www.govexec.com/story_page.cfm?articleid=30800 6

U.S. Chamber of Commerce, "Chamber Welcomes Bipartisan Debate on Immigration Reform," Jan. 21, 2004, www.uschamber.com/press/releases/2004/january/04-06.htm (Last checked on October 19, 2010) 4

U.S. Dept. of Homeland Security, *2003 Yearbook of Immigration Statistics*, Sept. 2004, 147, www.dhs.gov/xlibrary/assets/statistics/yearbook/2003/2003ENF.pdf (Last checked on October 19, 2010) 2, 32

U.S. General Accounting Office, "Prospects Dim for Effectively Enforcing Immigration Laws," GGD-81-4, Nov. 5, 1980, http://www.gao.gov/docsearch/featured/immigration.html (Last checked on October 19, 2010) 18

U.S. Government Accountability Office, *Immigration Enforcement: Weaknesses Hinder Employment Verification and Worksite Enforcement Efforts*, August 2005, GAO-05-813, www.gao.gov/new.items/d05813.pdf (Last checked on October 19, 2010) 31, 32

U.S. Immigration and Customs Enforcement, "Fact Sheet: Worksite Enforcement," April 30, 2009, www.ice.gov/news/library/factsheets/worksite.htm 32

Teresa Watanabe, "Thai workers describe being lured into slavery in U.S.," *The Los Angeles Times*, Sept. 9, 2010, AA3, Available at www.latimes.com/news/local/la-me-0909-slave-labor-20100909,0,4990986.story 27

STATEMENT OF INTEREST

Amicus curiae American Unity Legal Defense Fund ("AULDF") is a national non-profit educational organization dedicated to maintaining American national unity into the twenty-first century.[1] www.americanunity.org. AULDF has filed *amicus* briefs in recent cases, including *Mohawk Industries v. Williams,* No. 05-465, *certiorari* dismissed as improvidently granted after argument, 547 U.S. 516 (2006), *Crawford v. Marion County Election Board*, 553 U.S. 181 (2008), and *Horne v. Flores*, __ U.S. __, __ n. 10, 129 S.Ct. 2579, 2601 n. 10 (2009) (*citing* AULDF's *amici* brief). AULDF filed an amicus brief in the court below addressing the collapse of worksite immigration law enforcement from 1997 – 2005.

On July 30, 2010, all parties to this case, through counsel, filed consents with the Clerk to the filing of amicus briefs.

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[1] Pursuant to Rule 37.6, *amicus* certifies that no counsel for a party authored this brief in whole or in part, and no such counsel, party or person other than the *amicus* or its counsel made a monetary contribution intended to fund the preparation or submission of this brief.

PRELIMINARY STATEMENT

> ***Amici*** **["Business Organizations"] steadfastly oppose the knowing employment of illegal immigrants.** It is against federal law knowingly to employ illegal workers, and employers who violate this law are subject to an extensive (and exclusive) federal system of administration, adjudication and penalty. The efficacy and wisdom of that choice, made by Congress nearly 25 years ago, is not at issue here.

Brief of "Business Organizations" as *Amici Curiae* in Support of Petitioners, ("Bus.Org. Br."), P. 2 (emphasis added).

The statement above is disingenuous at best. Yet this statement, in context, illuminates the preemption arguments facing this Court. Petitioners and their *amici* know the central purpose of the law: Congress intended to stop the "knowing employment of illegal immigrants." But they also know the reality: "that choice, made by Congress nearly 25 years ago," is not enforced. That is the real conflict in this case.

This case cannot be decided without examining its context: the collapse of workplace immigration law enforcement.[2] *Altria Group, Inc. v. Good*, __ U.S. __, __, 129 S.Ct. 538, 550 (2008)("agency

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[2] "Between 1998 and 2001 the number of cases completed declined 80 percent . . . The number of arrests declined sharply in the next six years, dropping to 445 in 2003." U.S. Dept. of Homeland Security, *2003 Yearbook of Immigration Statistics*, Sept. 2004, 147. The total decline between 1997 and 2005, as described in more detail below, was more than 99%. *See*, chart, P. 32, *infra*.

nonenforcement of a federal statute is not the same as a policy of approval."). That examination does not appear in the briefs filed here by Petitioners and their *amici*.

Doing so here illustrates both that the "efficacy and wisdom of" Congress's choice to enact employer sanctions is still "at issue here," Bus.Orgs. Br. at 2, and that preemption is not warranted under express, field or conflict preemption theories.

Employers' current attitudes toward the hiring of illegal immigrant workers have been shaped by twelve years of non-enforcement of the federal prohibition against employment of illegal immigrants[3] (an enforcement collapse explained in more detail below). Many of the Petitioners and their *amici* are no different. Their purpose in this case is to continue the pattern of non-enforcement.[4]

These employers make no secret of their views: illegal immigrant workers are "essential." In 2004, for example, Petitioner U.S. Chamber of Commerce explained:

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[3] "President Obama's new immigration enforcement strategy led to a record number of criminal aliens being deported last year, but removals of other illegal immigrants fell to the lowest rate since 2007, before the Bush administration began a crackdown." Stephen Dinan, "More Criminal Aliens Deported Last Year," *The Washington Times*, Oct. 7, 2010, A1.

[4] Most American businesses disagree with Petitioners and their *amici*. A recent Zogby poll found a very large "divide between some business lobbying groups and their members." Steven Cammarota, *Business and Labor on Immigration: Contrasting Views of Leaders vs. Rank and File*, Center for Immigration Studies, February 2010, www.cis.org/Business-Union-Poll. 67% of small business owners and 59% of business executives support immigration law enforcement. *Id.*

> There could be as many as 10 million illegal immigrants in the United States, by some estimates. Many of these are undocumented and unskilled workers who fill **essential** jobs in our economy that otherwise would go empty. A steady and available labor force is **essential** for a growing and prosperous economy.[5]

The "Essential Worker Immigration Coalition" ("EWIC"), a project of Petitioner U.S. Chamber of Commerce,[6] says: "Employers can not afford the disruption in the workplace that would surely occur if an estimated 11 million migrants (5% of the workforce) were required to return to their home country."[7]

With this justification, these activists are not content to leave the issue as settled "nearly 25 years ago." Bus.Org. Br., 2. "Businesses are pushing back against the law, even as they scramble to comply with

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[5] U.S. Chamber of Commerce, "Chamber Welcomes Bipartisan Debate on Immigration Reform," Jan. 21, 2004, www.uschamber.com/press/releases/2004/january/04-06.htm (emphasis added).

[6] EWIC's e-mail address is ewic@uschamber.com. www.ewic.org. EWIC includes several Petitioners and *amici*. *Id.* On April 16, 2008, 400 illegal immigrant workers were arrested at a worksite of Pilgrim's Pride, Inc., an EWIC member. Miriam Marcus, "Pilgrim's Pride Plucked in Immigration Raids," *Forbes*, April 16, 2008, www.forbes.com/markets/2008/04/16/pilgrims-pride-immigrant-markets-equity-cx_mlm_0416market36.html. "'We share the government's goal of eliminating the hiring or employment of unauthorized workers,' the company said." *Id.*

[7] EWIC, "Why A Mandatory Return, 'Report To Deport,' Policy Is Not The Best Option," undated, www.ewic.org/index.php?option=com_content&task=view&id=47&Itemid=9.

it. 'It's crystal-clear that the employer sanctions law will harm the state economy,' says Glenn Hamer, president of [Petitioner] the Arizona Chamber of Commerce and Industry."[8]

> The impact [of increased immigration law enforcement] on immigrant-dependent industries such as construction and agriculture – whose workforce is at least two-thirds illegal – would be "devastating," predicted Craig Regelbrugge, government relations director for the American Nursery & Landscape Association. "There's no replacement workforce," he said. "This will give people a set of bad choices: Either they terminate their workers, or **they take a deep breath and duck and hope the law doesn't catch up to them**."[9]

Some major, high-profile employers repeatedly "take a deep breath and duck and hope the law doesn't catch up to them." *Id.* One example is Walmart Stores, Inc.

Amici "Business Organizations" claim that Walmart's hiring needs illustrate the dangers of a state-by-state enforcement scheme. Bus.Org. Br., at 18. "Walmart prides itself on recruiting a diverse workforce". *Id.* Walmart's "diverse workforce" apparently includes illegal immigrants in many different states.

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[8] Miriam Jordan, "Arizona Squeeze on Immigration Angers Business," *Wall Street Journal*, Dec. 14, 2007, B1.

[9] N.C. Aizenman, "Bush Moves to Step Up Immigration Enforcement, *Washington Post*, August 11, 2007, A1 (emphasis added).

For example, federal officials touted consent decrees entered against Walmart as the "two most significant enforcement actions taken by the United States in the field of immigration employment sanctions since the laws prohibiting employment of illegal aliens were first enacted in 1986."[10]

The investigation was triggered in 1998, by a hit-and-run accident in Honesdale, Pennsylvania.[11] A license plate, left at the scene, *id.*, led local law enforcement officials to investigate whether illegal immigrants were working at a Walmart store.[12] Walmart executives first denied using illegal immigrant workers, but "recorded conversations of unidentified Walmart executives, managers and contractors showed that immigration violations 'continued to occur with direct knowledge by the Walmart corporation.'"[13]

Finally, in 2001, federal agents raided Walmart stores in Pennsylvania, New York, Ohio and Missouri, and arrested approximately 100 illegal

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[10] Office of Public Affairs, U.S. Immigration and Customs Enforcement, "ICE, Walmart Reach $11 Million Settlement", *Inside ICE*, March 18, 2005, ("ICE News Release"), www.millerlawoffices.com/publications/Employers/ICE%20Wal-Mart%203.18.2005.pdf.

[11] Michael Barbero, "Walmart to Pay $11 Million," *The Washington Post*, March 19, 2005, E01.

[12] Chris Strohm, "DHS Calls on Corporations to Come Clean on Hiring Illegal Immigrants," *GovExec.com Daily Briefing*, March 18, 2005, www.govexec.com/story_page.cfm?articleid=30800.

[13] Jerry Seper, "Walmart Pays $11 Million to Settle Alien Case," *The Washington Times*, March 19, 2005, www.washingtontimes.com/news/2005/mar/18/20050318-104421-2951r.

immigrants. ICE News Release, *supra*. And again, on October 23, 2003, ICE agents arrested approximately 245 illegal immigrant workers at some 60 Walmart stores in 21 states. *Id.*

These limited prosecutions involved only 345 illegal immigrant workers out of a Walmart domestic workforce then totaling 1,200,000 workers.[14] And the fine is an insignificant financial event for the world's largest retailer. "[F]or Walmart, which made $289 billion in retail sales last year, it will take about 16 hours of sales to pay it off."[15] Only seven months after the touted consent decree, Walmart again was caught using hundreds of illegal immigrants, in Pennsylvania and North Dakota.[16]

Of course, Walmart is not a party in this case, and the vast majority of American companies do not knowingly hire illegal immigrant workers. Yet many cases indicate that the Walmart case is not an isolated or aberrant instance.[17]

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[14] Associated Press, "Walmart Mops Up Immigrant Flap," CBSNews.com, March 18, 2005, www.cbsnews.com/stories/2005/03/18/national/main681593.shtml.

[15] Seper, *supra*, n. 13.

[16] CNNMoney.com, "Police: Walmart Site Raided," Nov. 19, 2005, http://money.cnn.com/2005/11/18/news/fortune500/walmart_raid/index.htm

[17] *See, e.g., Williams v. Mohawk Industries*, 411 F.3d 1252 (11th Cir. 2005)(upholding American workers' RICO claim against repeated and widespread hiring of illegal immigrant workers), *certiorari* dismissed, after oral argument, as improvidently granted, 547 U.S. 516 (2006); *Hoffman Plastic Compounds, Inc. v. NLRB*, 535 U.S. 137 (2002); *Sure-Tan, Inc. v. NLRB*, 467 U.S. 883 (1984); *Baker v. IBP, Inc.*, 357 F.3d 685,

The District Court below recognized the real conflict in this case, and rejected Petitioners' position:

> [I]t is hard to see how state employer sanctions provisions that are carefully drafted to track the federal employer sanctions law can be inconsistent with it – **unless we take ineffective enforcement to be the "real" federal policy from which state law must not deviate.**

Ariz. Contractors Ass'n v. Candelaria, 534 F.Supp.2d 1036, 1055 (D.Ariz. 2008) (emphasis added).

686-87 (7th Cir.), *cert. denied*, 543 U.S. 956 (2004) (allegations that "about half of the employees at IBP's Joslin meatpacking plant are aliens who cannot work lawfully in the United States and that IBP not only knows in a statistical sense that many of its workers lack the sort of visas that authorize working here but also can identify which ones they are, yet winks at obviously fake green cards and other spurious credentials."); *Commercial Cleaning Services, L.L.C. v. Colin Service Systems, Inc.*, 271 F.3d 374, 379 (2d Cir. 2001) (janitorial company sued competitor which had been prosecuted for hiring hundreds of illegal immigrants); *Mendoza v. Zirkle Fruit Co.*, 301 F.3d 1163 (9th Cir. 2002)(alleging widespread hiring of illegal immigrant farm workers); *Trollinger v. Tyson Foods, Inc.*, 370 F.3d 602, 606 (6th Cir. 2004)(employees' suit followed federal indictment of Tyson Foods, Inc., for hiring illegal immigrants at 15 plants in nine states).

SUMMARY OF ARGUMENT

This case involves a savings clause in an express preemption provision. Petitioners first argue that the statutory language does not mean what it says, but their real argument is that the savings clause is irrelevant because Arizona's new law is impliedly preempted: "IRCA[18] does not focus single-mindedly on enforcement and punishment. To the contrary, Congress recognized other, ofttimes-competing goals." Petitioners complain that Arizona's "strategy of maximal enforcement" "will interfere with this delicately-crafted congressional balance."

This Court has rejected the "balance" theory. *I.N.S. v. National Center for Immigrants' Rights, Inc.* 502 U.S. 183, 194, n. 8 (1991). This "balance" argument only works by ignoring other portions of IRCA, its legislative history, and later congressional enactments. IRCA was intended, first and foremost, to stop illegal immigration. The "other, ofttimes-competing goals" were secondary.

In this context, Petitioners' implied field preemption arguments cannot prevail. Congress, in 1986 and again in 1996, acted in ways which indicate it did not intend that administrative enforcement of "employer sanctions" under 8 U.S.C. § 1324a was to be the sole protection against hiring illegal immigrants:

1) Congress showed no concern over state laws, as one might expect if the balance were "delicately-crafted." Instead, late in the consideration of IRCA, Congress added the savings clause to a previously-absolute preemption clause. The most

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[18] The Immigration Reform and Control Act of 1986, ("IRCA"), Pub.L. No. 99-603, 100 Stat. 3359 (1986).

reasonable interpretation of the change is that Congress believed the previous absolute preemption provision was too restrictive, and that states' historical powers should be recognized, not preempted.

2) The savings clause expressly permits state "licensing **and similar laws**." The House Judiciary Committee report (on which Petitioners rely to interpret the savings clause) indicates the clause was intended to clarify that Congress did not intend to preempt three different enforcement and penalty mechanisms outside employer sanctions, including state labor protections. Petitioners do not reconcile these broad preemption exceptions with their theory that the savings clause is limited to a few agricultural employers who have already been found to have violated § 1324a.

3) Congress created another enforcement and penalty structure for hiring illegal immigrants in 8 U.S.C. § 1324 – the section immediately before the new "employer sanctions" provisions. Late in the consideration of IRCA (and after the creation of the savings clause), Congress deleted the "Texas Proviso," which had exempted employers from "harboring" penalties. In 1996, Congress strengthened § 1324 and increased the penalties for its violation, including the death penalty. Courts have applied these penalties in lieu of and in addition to § 1324a. Under Petitioners' theory, a State could not revoke the business license of an employer who has been found to have violated § 1324. There is no consideration for the elements of Petitioners' "balance" in these separate and more powerful prohibitions on hiring illegal immigrants.

4) In addition to the new federal penalties under § 1324, Congress added private and state rights of action under § 1324 and enhanced penalties under RICO to the hiring of illegal immigrants, in an effort to stop the horrible conditions which accompany illegal immigration. The new causes of action are wholly outside the new "employer sanctions" provisions of § 1324a, may be brought in state court, and, again, have no consideration for Petitioners' "balance of competing goals." It would be odd to say that individuals may bring treble-damages state suits against employers of illegal immigrants, but states may not.

5) Congress also enlisted the aid of state and local law enforcement. By 1996, Congress had determined that § 1324a was inadequate to achieve its central purpose of ending the hiring of illegal immigrants. Congress then requested help from the states; it would be difficult to read this call for help as intent to occupy the field.

Nor are Petitioners' conflict preemption arguments any more effective. The real conflict is not between Arizona's law and federal law, but between federal statutes against hiring illegal immigrants, and federal agencies' refusal to enforce those immigration laws.

Congress has consistently declared its intention to stop the employment of illegal immigrants. Nevertheless, workplace immigration law enforcement collapsed in 1998, leading to a 99% decline in arrests by 2005. The collapse was caused solely by agency memoranda, not approved or authorized by Congress. Enforcement has never recovered, and in 2010, the agency again issued new memoranda cutting enforcement priorities.

The impact of the enforcement collapse falls most heavily on low-income American workers. Thus, Petitioners' conflict preemption argument is that Congress intended the most vulnerable Americans to bear the brunt of their "balance." There is no evidence that Congress intended that result.

The burden to preempt a State law targeting illegal, as opposed to legal, immigrants is very high. Congress must speak clearly and manifestly to oust harmonious state laws. Congress has never done so. As shown in the field preemption section, Congress has done the opposite, indicating that it intended not to preempt those laws.

Petitioners' arguments boil down to continuing an unauthorized federal agency policy of non-enforcement. Congress has consistently sought to stop the employment of illegal immigrants. The Court should not credit agency pronouncements in conflict with congressional intent.

Arizona's law is consistent with congressional intention. It should not be preempted. The lower court should be affirmed.

ARGUMENT

This case is about the savings clause in 8 U.S.C. § 1324a(h)(2): "The provisions of this section preempt any State or local law imposing civil or criminal sanctions **(other than through licensing and similar laws)** upon those who employ, or recruit or refer for a fee or other consideration for employment, unauthorized aliens." (Emphasis added.)

Petitioners argue that the savings clause does not mean what it says, but their real argument is that the "unauthorized worker provisions of the Arizona Act also are impliedly preempted. The existence of an express preemption provision (or savings clause) does not bar the ordinary working of conflict pre-emption principles, or impose any special burden on demonstrating preemption" Pet. Br. at 37.

Implied preemption has two subcategories. *See Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525, 541 (2001). The first is field preemption, where "the depth and breadth of a congressional scheme ... occupies the legislative field." *Id.* The second is conflict preemption, which occurs when either "compliance with both federal and state regulations is a physical impossibility," *Fla. Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 142-43 (1963), or where "state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress," *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941).

The crux – indeed essentially the entirety of Petitioners' and their *amici*'s implied preemption argument – is that Congress intended a "balance" of competing priorities. "It balanced multiple,

sometimes competing, objectives: deterring illegal immigration, protecting applicants from discrimination, accommodating privacy concerns, and minimizing burdens on employers." Pet. Br., at 2; "the delicate balance that federal law embodies", Brief of the United States ("U.S. Br.") at 10.

Petitioners claim that Arizona's "strategy of maximal enforcement," Pet. Br. at 43, will "disrupt[] the balance that Congress struck among its various policy objectives." Pet. Br. at 42. Petitioners sum up by saying the "narrowness of this" savings clause "reflects again the care that Congress took in balancing all of the relevant interests, and its concern that additional sanctions—beyond those associated with traditional 'licensing' decisions—would disrupt the federal system." Pet. Br. at 44.

This Court already considered this "balance" theory when it was raised in *Nat'l Ctr. For Immigrants' Rights, Inc. v. INS*, 913 F.2d 1350, 1366 (9th Cir. 1990), *rev'd*, 502 U.S. 183 (1991). This Court unanimously reversed that analysis. 502 U.S. at 191-94, and 194 n. 8 ("We have often recognized that a "primary purpose in restricting immigration is to preserve jobs for American workers. ... This policy of immigration law was forcefully recognized most recently in the IRCA.").

Nevertheless, Petitioners and others successfully promoted this theory to the Third and Tenth Circuits:

> [I]t is indisputable that Congress went to considerable lengths in enacting IRCA to achieve a careful balance among its competing policy objectives of effectively deterring employment of unauthorized aliens, minimizing the resulting burden on employers,

> and protecting authorized aliens and citizens perceived as "foreign" from discrimination. *See [Chamber of Commerce v.] Edmondson*, 594 F.3d [742,] 767 [(10th Cir. 2010)] (IRCA balances the goals of "preventing the hiring of unauthorized aliens, lessening the disruption of American business, and minimizing the possibility of employment discrimination.".

Lozano v. City of Hazelton, __ F.3d __, ___, 2010 WL 3504538, *32 (3rd Cir. Sept. 9, 2010).

Congress did address a variety of concerns in constructing "employer sanctions" under 8 U.S.C. § 1324a, including a substantial, though disputed,[19] fear that § 1324a would cause discrimination.[20] But Petitioners' "balance" analysis works only if other portions of IRCA, its legislative history, and later congressional enforcement enhancements are ignored.

Seen in context, however, the "balance" theory does not support implied preemption, in either field or conflict flavors. Congress did not commit equally to these various elements.

First and foremost, Congress wanted to stop illegal immigration.[21] The other "factors," "goals,"

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[19] "The Committee does not believe that such discrimination will occur." S. Rep. 99-132, at 9. Petitioners and their *amici* tend to emphasize actions of the House of Representatives, but the Senate was an equal partner.

[20] The anti-discrimination provisions terminate when § 1324a does. 8 U.S.C. § 1324b(k)(1). They do not apply to the separate prohibitions and penalties in 8 U.S.C. § 1324.

[21] "The major purpose of this bill is to make progress toward the day when the American people can be assured that the limitations and selection criteria contained in the immigration statutes are actually implemented through

"interests," and "policy objectives" were secondary, to ameliorate problems generated by § 1324a. This is best illustrated by the express language of the statute, but also by Congress's concurrent and later adoption of other enforcement mechanisms and penalties for hiring illegal immigrants which are wholly outside Petitioners' "balance" and "exclusive federal administrative enforcement" theories.

I. PETITIONERS' FIELD PREEMPTION ARGUMENT IS PRECLUDED BY OTHER AVENUES TO STOP EMPLOYMENT OF ILLEGAL IMMIGRANTS.

The simple answer to Petitioners' field preemption argument is the savings clause itself; no matter how interpreted, the savings clause allows some state regulation. This Court, in *De Canas v. Bica*, said that field preemption did not apply to State laws affecting illegal immigrants. 424 U.S. 351, 357-58 (1976). In IRCA, Congress expressly chose not to occupy the field.

Petitioners nevertheless contend that, despite the savings clause, the enactment of employer sanctions in 8 U.S.C. § 1324a changed the field so that all State laws punishing the employment of illegal immigrants are now preempted, except a small subset of laws affecting the business licenses of

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adequate enforcement." S. Rep. 99-132, at 3. "Unless illegal immigration is brought under control, I and many others, fear an increasing public intolerance - a lack of compassion if you will - to all forms of immigration - legal and illegal. It is this unwanted and wretched result that this bill today attempts to avoid." 131 CONG. REC. S7039 (May 23, 1985) (Statement of Sen. Simpson).

agricultural labor contractors who have already been found to have violated §1324a. Pet. Br. at 45-47.

Yet Congress, in 1986, and again in 1996, acted in ways which indicate that it did not intend that federal administrative enforcement be the sole occupant of this field, including:

- adding the savings clause to a previously-absolute preemption clause;
- protecting three different types of "licensing **and similar** laws" against preemption, including state labor protections;
- enacting, in 8 U.S.C. § 1324, a prohibition against and substantial penalties (including the death penalty) for the employment of illegal immigrants completely outside § 1324a;
- applying private and state rights of actions and enhanced penalties under RICO to the hiring of illegal immigrants; and,
- enlisting the aid of state and local law enforcement.

None of these congressional actions evince the "competing goals" Petitioners advance here. Instead, they are consistent with the "major purpose" of IRCA: to stop the hiring of illegal immigrants. S. Rep. 99-132, at 3.

A) There is No Evidence of Congressional Concern About State "Licensing and Similar Laws."

One question neither Petitioners nor their *amici* address is why the savings clause includes

"licensing and **similar** laws"? Congress apparently did not intend the savings clause to be given a narrow interpretation.

If Congress was concerned about State "licensing and similar laws" disrupting a delicate house of cards, it should have left at least some evidence of its concern at some point during the years of debate. There was none.

By contrast, there was clear evidence of concerns with state laws dealing with agricultural workers. H.R. Rep. 98-115(II) (1983), 19, 45 (Committee preemption amendment because "it was essential that the temporary worker program be controlled by the Federal Government").

Congress also showed concern that the experience with State employer sanctions laws had demonstrated a major flaw: "State laws are virtually unenforced because of the problem of determining when employers 'knowingly' employ an alien not entitled to lawful residence." U.S. General Accounting Office, "Prospects Dim for Effectively Enforcing Immigration Laws," GGD-81-4, Nov. 5, 1980, at 9.[22] That concern was apparently satisfied by the new verification procedures in IRCA.

Instead, late in its consideration of IRCA, Congress added the savings clause to what had been

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[22] *See*, also H. Rep. 98-115 (I), at 178 (Dissenting Views of Reps. Edwards, Conyers and Schroeder) ("Employer sanctions have been proven ineffective at the state level in the many states with such laws on the books."), *Immigration Reform and Control Act of 1985: Hearings Before the Subcommittee on Immigration, Sen. Cmte on the Judiciary*, S. Hrg. 99-273, Serial No. J-99-35, 99th Cong. (1985) ("Senate Hearings"), at 489 (Statement of Mr. Ralph B. Evans for the National Restaurant Assn.) ("Well, first, let me say that in the State of Virginia, it is already illegal to hire an undocumented alien.").

an absolute express preemption clause.[23] The savings clause first appeared in 1985 in S. 1200, S. Rep. 99-132, at 100, whose sponsor included "changes [which] represent the culmination of a long learning and education process." 131 CONG. REC. S7039 (May 23, 1985) (Statement of Sen. Simpson). The most reasonable interpretation of this change was a concern that the original, absolute preemption clause had been too restrictive of state laws.

Explaining the scope of this change, the House Committee Report, H.R. Rep. 99-115(I), at 58 (on which Petitioners rely, Pet. Br., at 6, 17), said the "penalties contained in this legislation" were intended only to preempt "civil fines and/or criminal sanctions," and listed three separate areas in which the new preemption provision was not intended to supplant state law:

1) the preemption provision was not intended to "preempt or prevent" the "suspension, revocation or refusal to re-issue a license" to any person who has been found to have violated "the sanctions provisions";

2) the preemption provision was not intended to preempt licensing or "fitness to do business laws" which "specifically require such licensee or contractor to refrain from hiring, recruiting or referring undocumented aliens", which the courts below noted include more than Petitioners' theory of just agricultural employment laws; and,

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[23] *Compare*, S. Rep. 98-62 (1983) at 166 (preemption provision without savings clause) and H.R. Rep. 98-115(I) (1983) at 5 (same) *with* S. Rep. 99-132 (1985) at 100 (savings clause) and H.R. Rep. 99-682(I) at 186 (same).

3) the preemption provision was not intended to "undermine or diminish in any way labor protections in existing law", or to "limit the powers of federal or state labor relations" officials or agencies, which, as this Court noted in *De Canas v. Bica*, was a traditional area of state power over the employment of illegal immigrants. 424 U.S. at 356-57.

The savings clause was not intended to create a "delicate balance" that occupied the field; instead it expressly left areas for state regulation. Congress was doing what it said: trying to stop the employment of illegal immigrants.

B) In 1986, Congress Intended to Prohibit the Knowing Employment of Illegal Immigrants Through a Different "Balance" Than Petitioners Suggest.

Nevertheless, Petitioners make sweeping claims about what Congress intended in 1986. "IRCA does not focus single-mindedly on enforcement and punishment. To the contrary, Congress recognized other, ofttimes-competing goals." Pet. Br. at 6.

Petitioners' principal point is that Congress "intended **IRCA** to be the 'least disruptive to the American businessman ... [while] also minimiz[ing] the possibility of employment discrimination.' H.R. Rep. No. 99-682(I), at 56; S. Rep. No. 99-132, at 8-9 (same)." Pet. Br., 6 (emphasis added).

This is a mis-quote. The full paragraph said:

> **These penalties are prospective** and shall apply only to acts of employment, referral or recruitment that take place after the enactment of this legislation. The Committee felt such as [*sic*] approach would be the least

> disruptive to the American businessman and would also minimize the possibility of employment discrimination.

H.R. Rep. 99-682(I) at 56 (emphasis added).

The difference is significant. In its "Purpose and Summary" of S. 1200 (which introduced the savings clause), the Senate Judiciary Committee did not even mention these "other, ofttimes-competing goals." S. Rep. 99-132, at 1-2. The Senate Judiciary Committee summarized the bill's "Purpose" in one sentence: "The Committee bill is intended to increase control over illegal immigration." S. Rep. 99-132, at 1.

This was, contrary to Petitioners' characterization, a fairly "single-minded" focus "on enforcement and punishment." Pet. Br. at 6. Responding to decisions of this Court, Congress sought a "balance" in 1986, but it was more focused on "enforcement and punishment:"

> But in virtually every immigration case that is decided in the U.S. Supreme Court, the Supreme Court points out what an impossible burden, an absolutely impossible burden we place on enforcement officials by allowing what is best described as a "goofy" situation to continue in the United States where it is illegal for an alien to take a job but not illegal for the employer to hire the person. That continues, and that is the law of the United States of America and let us all get that right on the table first because that is what has got us in this Gordian knot. It is legal to hire an illegal but it is illegal for the illegal to work.

Senate Hearings, at 159 (Statement of Sen. Simpson).

This enforcement imbalance between employers and employees was caused by the so-called

"Texas Proviso." Prior to 1986, the relevant federal crime, 8 U.S.C. § 1324,[24] prohibited smuggling, harboring or transporting illegal immigrants, *U.S. v. Evans,* 333 U.S. 483 (1948)(Congress intended to punish both bringing in and aiding the continued presence of illegal immigrants), but the Texas Proviso said "harboring" did not include "the usual and normal practices incident to employment." *De Canas v. Bica,* 424 U.S. at 360.

The Texas Proviso survived until late in the consideration of IRCA, including after the 1985 introduction of the savings clause. S. Rep. 99-132, at 76 (only amending the Texas Proviso to state that employment "by itself" was not harboring). In 1986, however, Congress finally deleted the Texas Proviso in its entirety, 8 U.S.C. § 1324(a), and also added the new employer sanctions provisions. 8 U.S.C. § 1324a.

The deletion of the Texas Proviso meant that employers could be penalized directly in ways other than through the "employer sanctions" scheme of 8 U.S.C. § 1324a. *Edwards v. Prime, Inc.,* 602 F.3d 1276, 1299 (11th Cir. 2010) ("We tend to agree with the Second Circuit that the revision history of § 1324(a)(1)(A)(iii) strongly indicates that one who hires an alien knowing or recklessly disregarding his illegal status is guilty of concealing, harboring, or

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[24] Section 1324 is neither obscure nor abstract to those involved in immigration. "'We could all go in the van,' John suggests. 'But then I could be arrested for harboring.'" Stephanie McCrummen, "In Arizona, Stark Choices," *The Washington Post*, Oct. 10, 2010, A1; Morgan Lee, "Immigration Agents Raid Otay Mesa Bakery," *San Diego Union-Tribune*, October 14, 2010, www.signonsandiego.com/news/2010/oct/14/immigration-agents-raid-san-diego-bakery/.

shielding from detection."); *U.S. v. Kim*, 193 F.3d 567, 573 (2nd Cir., 1999) ("the evolution of § 1324(a)(i)(A)(iii) to its present form makes clear that Congress intended it to cover employers . . . The fact that employers are also targeted by § 1324a provides no support for Kim's contention that he should have been prosecuted under § 1324a."); *U.S. v. Ye*, 588 F.3d 411 (7th Cir. 2009).

> The legislative history demonstrates that Congress intended § 1324 to cover employers such as the Appellees. Congress expressly noted the pervasive problem of illegal alien employment and its harmful effect on the American worker. Each time an employer hires an illegal alien, an American citizen loses an employment opportunity. Congress understood this problem and chose to penalize employers for hiring illegal aliens and harboring them from detection by providing transportation and housing for them.

U.S. v. Zheng, 306 F.3d 1080, 1087 (11th Cir., 2002).

Contrary to Petitioners' position, Congress did not intend a "delicately-balanced" 8 U.S.C. § 1324a to be the "exclusive," administratively-enforced protection against hiring illegal immigrants. Even in 1986, Congress was looking for more.

C) In 1996, Congress Strengthened the Prohibitions Against Hiring Illegal Immigrants, Again, With No Consideration for "Balance."

Congress was aware by 1995 that employer sanctions were not effective in stopping employers

from hiring illegal immigrants. H.R. Rep. 104-469 (1995), at 129.

In 1996, Congress increased workplace enforcement of immigration laws in ways having little to do with Petitioners' "balance" of "competing goals." Pet. Br. at 6. Even if Congress had intended equivalence in IRCA between immigration law enforcement in the workplace and "other, ofttimes-competing goals," that was not true by 1996.

In 1996, a Congressional conference declared that "immigration law enforcement is as high a priority as other aspects of Federal law enforcement, and illegal aliens do not have the right to remain in the United States undetected and unapprehended". H.R. Rep. 104-725 (1996), at 383 (Conf. Rep.). Congress reinforced federal enforcement resources by adding State and private enforcement authority, and by significantly increasing penalties for hiring illegal immigrants under § 1324.

1) Additional Enforcement Through Express Authority for State and Local Law Enforcement Cooperation:

In 1978, Attorney General Griffin Bell issued a directive which "established the policy of the Carter Administration that Federal-State cooperation in this area was not to be encouraged." S. Rep. 98-62, at 128 (Additional Views of Sen. Charles E. Grassley).

Sen. Grassley then promoted an amendment to "clarify a confused situation in which state and local law enforcement agencies were unsure as to their liability if they cooperated with Federal immigration officers." *Id.* His amendment passed the Senate subcommittee, but he dropped it after assurances from Attorney General William French Smith and

INS Commissioner Alan Nelson that they would reverse the Bell directive. *Id.* Smith issued a new directive on Federal-State cooperation on Feb. 10, 1983, which Grassley called a "very important step which will greatly assist our immigration control efforts." *Id.*

Thus, in 1986 Congress saw no need to statutorily authorize Federal-State cooperation in immigration law enforcement. In 1996, however, seeking more enforcement capability, Congress formalized the "287g" program to expressly promote state-federal cooperation in immigration law enforcement. 8 U.S.C. § 1357(g).

2) Additional Enforcement Through Private and State Suits, Including RICO Enhancements:

Also in 1996, Congress took three separate steps to create a private right of action against, and increase penalties for, employers of illegal immigrants. Congress amended the list of RICO[25] predicate crimes to include "any act which is indictable under the Immigration and Nationality Act, section 274 [8 U.S.C. § 1324] (relating to bringing in and harboring certain aliens) . . . if the act . . . was committed for the purpose of financial gain." 18 U.S.C. § 1961(1)(F).

Workers may bring RICO claims against employers who hired illegal immigrants. *Williams v.*

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[25]The Organized Crime Control Act of 1970, Pub.L. 91-452, 84 Stat. 941, added Chapter 96 to Title 18 of the United States Code, entitled Racketeer Influenced and Corrupt Organizations ("RICO"). 18 U.S.C. §§ 1961-1968; *U.S. v. Turkette*, 452 U.S. 576, 577-78 (1981). Only certain predicate crimes trigger the application of RICO. 18 U.S.C. § 1961(1).

Mohawk Industries, 411 F.3d at 1266; *Mendoza v. Zirkle Fruit Co.*, 301 F.3d at 1168.

The addition of RICO liability exposes employers of illegal immigrants to state-level RICO suits. *Tafflin v. Levitt*, 493 U.S. 455, 458 (1990). On remand, in *Mohawk Industries*, for example, the Eleventh Circuit permitted the employer of illegal immigrants to be sued under Georgia's RICO statute. 465 F.3d 1277, 1293-94 (11th Cir. 2006), *cert. denied*, 127 S.Ct. 1381, 167 L.Ed.2d 174 (Feb. 26, 2007).

Congress also expanded § 1324 to penalize directly (as opposed to being considered harboring) the hiring of more than ten immigrants per year. 8 U.S.C. § 1324(a)(3)(A), Omnibus Consolidated Appropriations Act, 1997, Pub.L. 104-208, (1996), Div. C, Title II, § 203(b)(4).

In addition, Congress increased the penalties under § 1324 to include lengthy prison terms, and in some cases, possibly the death penalty.[26] 8 U.S.C. § 1324(a)(1)(B).

Lessening the burden on business was not the purpose of these changes; the 1996 RICO amendment, for example, was to protect against exploitation of smuggled illegal immigrants. As the sponsor of this amendment noted:

> In the past couple of years we have heard about boatloads of Chinese immigrants being brought to the United States under horrifying conditions – weeks with no clean water, minimal food, and unsanitary conditions beyond imagination. The gangs responsible for smuggling these people into the United States

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[26] Ironically, Petitioners complain that Arizona's law imposes a "business death penalty" in the revocation of licenses. Pet. Br. at 45.

> then force them into slave labor, working 12- to 14-hour days, 7 days a week in gruesome conditions just to pay off the $30,000 to $40,000 debt they incurred. These horrible abuses at the hands of people willing to profit from the trade of human beings must be stopped.
>
> The purpose of this provision is to address the problem of slave trade, where traffickers use the dream of America and freedom to lure people into the bondage of slavery for their own profit.

141 CONG. REC. H1590 (Feb. 10, 1995) (Statement of Cong. Kennedy).

Though Cong. Kennedy's language may not apply to any parties to this case,[27] the sponsor's statement indicates that Congress's purpose was to stop an odious practice, and not to recognize concerns about efficiency in hiring. Congress believed that using private claims under Section 1324 would help stop the "horrifying conditions" to which the immigrants may have been subject.

RICO and 8 U.S.C. § 1324 were not raised in this case. As a policy matter, however, it would be odd

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[27]Some of the present-day cases involve charges similar to those which sparked congressional action; for example, illegal immigrant workers were being locked inside stores at night against their will, though the defense was that this was for security reasons. *Zavala v. Walmart Stores, Inc.*, 393 F.Supp.2d 295, 334-35 (D.N.J. 2005); *see, also*, Teresa Watanabe, "Thai workers describe being lured into slavery in U.S.," *The Los Angeles Times*, Sept. 9, 2010, AA3; Elissa Silverman, "Pay Fight in Tech's Trenches; Day Laborers for a Verizon Subcontractor Say They Were Cheated," *The Washington Post*, Feb. 16, 2006, D1.

to say that workers can sue employers in state courts for hiring illegal immigrants, but that states are preempted from enacting any "licensing or similar laws" for the same purpose.

In enacting both 8 U.S.C. §§ 1324 and 1324a, Congress did not intend to create an exclusive federal administrative remedy. It sought assistance from others in 1986 by permitting states to use "licensing and similar statutes" against those who hire illegal immigrant workers, and, when that didn't work, in 1996, by private enforcement.

There has been no showing that Congress intended to preempt state "licensing and similar laws." The available legislative history shows the opposite; Congress wanted to prohibit hiring illegal immigrants, using several means not within Petitioners' "exclusive" "balance." It expressly chose not to occupy the field.

II) PETITIONERS' CONFLICT PREEMPTION ARGUMENT IS PRECLUDED BECAUSE THE CONFLICT IS BETWEEN FEDERAL STATUTES AND FEDERAL AGENCY REFUSAL TO ENFORCE THOSE LAWS, NOT BETWEEN FEDERAL AND ARIZONA LAWS.

Petitioners also assert a conflict preemption argument. Pet. Br. at 37, 44. Conflict preemption exists "where it is impossible for a private party to comply with both state and federal requirements, or where state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Sprietsma v. Mercury*

Marine, 537 U.S. 51, 65 (2002). "[O]ur task of statutory construction must in the first instance focus on the plain wording of the clause, which necessarily contains the best evidence of Congress' preemptive intent." *Id.*, 537 U.S. at 62-63.

Petitioners seek to avoid enforcement of the federal statutory prohibition against employing illegal immigrants. *Id.*, 527 U.S. at 67 ("although the Coast Guard's decision not to require propeller guards was undoubtedly intentional and carefully considered, it does not convey an 'authoritative' message of a federal policy"). Congress has never authorized a failure to enforce § 1324 or § 1324a. If there is a conflict, it is not between Arizona's law and federal statutes, it is between congressional intention (expressed in federal statutes) and the manner in which federal law is being enforced.

A) Workplace Immigration Law Enforcement Has Collapsed since 1998.

Since 1986, Congress has declared its intention to prohibit the employment of illegal immigrants. Congress declared enforcement "as high a priority as other aspects of Federal law enforcement". H.R. Rep. 104-725 (1996) (Conf. Rep.), at 383.[28]

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[28] "[B]usinesses must be held accountable if they break the law by deliberately hiring and exploiting undocumented workers. We've already begun to step up enforcement against the worst workplace offenders. And we're implementing and improving a system to give employers a reliable way to verify that their employees are here legally. But we need to do more." President Barack Obama, *Remarks by the President on Comprehensive Immigration Reform*, July 1, 2010,

For a time after the 1986 enactment of "employer sanctions," the enforcing agencies seemed to abide by the statutory priorities. A 1991 Immigration & Naturalization Service memorandum ordered an enhanced worksite enforcement initiative: "The message to employers must be unequivocal – INS is prepared to vigorously enforce administrative and criminal sanctions against those who violate the law."[29] In 1995, President Clinton issued "a memorandum which identified worksite enforcement and employer sanctions as a major component of the Administration's overall strategy to deter illegal immigration."[30]

By 1996, there appeared to be a breakthrough: INS developed "Operation Vanguard," a new "efficient and effective" interior enforcement strategy – auditing employment verification forms required by employer sanctions. CRS, *Immigration Enforcement*, at 38-39 ("[Operation] Vanguard demonstrated an efficient and effective capability to bar unauthorized workers from employment in any given sector.").

The breakthrough, however, was throttled immediately by an internal agency decision, not authorized or approved by Congress. Interior immigration law enforcement has never recovered.

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www.whitehouse.gov/the-press-office/remarks-president-comprehensive-immigration-reform ("Obama remarks").

[29] Congressional Research Service ("CRS"), *Immigration Enforcement Within the United States*, April 6, 2006, CRS RL 33351 ("*Immigration Enforcement*"), at 37.

[30] *Id.*

1) A 1998 INS Internal Memorandum Cut Workplace Enforcement by 99%.

In 1998, INS abandoned the "effective" strategy of "Operation Vanguard" *because* it was effective. "When the capability was realized, it was stopped." CRS, *Immigration Enforcement*, at 39; *see, also, id.*, at 61-62 (describing May 1998 "Immediate Action Directive for Worksite Enforcement Operations" memorandum by INS Executive Associate Commissioner for Field Operations Michael Person ("the Person memorandum") ordering a cutoff of worksite enforcement). INS abandoned the "effective" policy because of "complaints," *id.* at 38, 62, not because Congress changed the law.

As a result of the Person memorandum, the reality of worksite immigration enforcement was substantially different from Congress's intention: "Since fiscal year 1999,. the number of notices of intent to fine issued to employers for violations of IRCA [8 U.S.C. § 1324a] and the number of administrative worksite arrests have **declined**. . ."[31]

GAO's bland language masks the true extent of the "decline[]". As shown on the following chart, between 1996 and 2005, workplace arrests for violations of the prohibitions on hiring illegal immigrants "declined" 99.1%, and penalties to employers "declined" 99.7%:

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[31] U.S. Government Accountability Office ("GAO"), *Immigration Enforcement: Weaknesses Hinder Employment Verification and Worksite Enforcement Efforts*, ("*Immigration Enforcement Weaknesses*"), August 2005, GAO-05-813, at 30.

Fiscal Year[32]	Worksite Arrests	Notices of Intent to Fine
1997	17,554	865
1998[33]	13,914	1,023
1999	2,849	417
2000	953	178
2001	735	100
2002	485	53
2003	445	162
2004	159	3
2005	81	8
2006	3,667	0
2007	4,077	22
2008	5,184	32
2009	1,654	172

[32] Sources: 1997-98 data: U.S. Dept. of Homeland Security, *2003 Yearbook of Immigration Statistics*, Sept. 2004, Table 39. 1999-2005 data: GAO, *Immigration Enforcement Weaknesses*, 35, 36, Figures 4 and 5. 2006-2008 data from ICE, "Fact Sheet: Worksite Enforcement," April 30, 2009, www.ice.gov/pi/news/factsheets/worksite.htm. 2005-2008 Notices of Intent to Fine, and 2009 data from letter response in U.S. Immigration and Customs Enforcement FOIA Case Number 2010FOIA5627, *reprinted* in Appendix.

[33] The Person memorandum cutting enforcement was issued in May 1998.

2) In 2010, the "Morton" Internal INS Memoranda Again Cut Worksite Immigration Enforcement.

On July 1, 2010 President Obama declared "We need to do more."[34] The day before, however, John Morton, the head of ICE, had issued a memorandum[35] to do less.

> New guidance telling U.S. Immigration and Customs Enforcement agents to focus on apprehending terrorists and criminals has many of ICE's rank-and-file agents wondering who then is responsible for tracking down and detaining the millions of other illegal border crossers and fugitive aliens now in the country.[36]

On August 20, 2010, another Morton memo[37] cut deportation of illegal immigrants. Once illegal immigrants are apprehended, they are to be let go, unless they have serious criminal records or are national security risks. "Immigration enforcement officials have started to cancel the deportations of thousands of immigrants they have detained".[38]

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[34] Obama remarks, *supra*, n. 28.

[35] Available at www.cis.org/articles/2010/civil_enforcement_priorities-1.pdf.

[36] Jerry Seper, "Lack of resources curtails ICE tracking of illegals," *The Washington Times*, Aug. 8, 2010, A1.

[37] Available at http://graphics8.nytimes.com/packages/pdf/us/27immig_memo.pdf.

[38] Julia Preston, "Immigration Agency Ends Some Deportations," *The New York Times*, Aug. 27, 2010, A14.

Thus, there is, effectively, no interior immigration law enforcement for the vast majority of illegal immigrants in the United States. ICE, the agency entrusted with enforcing the law, enforces it only against terrorists and aliens who have been convicted of serious crimes. If other illegal immigrants are apprehended, they are to be released, not deported. This policy conflicts with federal law and with President Obama's public priorities.

B) The Impact of the Immigration Enforcement Collapse Falls Most Heavily on American Low-Income Workers.

Illegal immigration is not a free and fair economic exchange; it always involves illegality and often involves coercion, as Congress noted in increasing the penalties under § 1324. 141 CONG. REC. H1590 (Feb. 10, 1995) ("slave trade"). It also imposes substantial costs on those least able to bear the burden:

> Employment of illegal aliens in times of high unemployment deprives citizens and legally admitted aliens of jobs; acceptance by illegal aliens of jobs on substandard terms as to wages and working conditions can seriously depress wage scales and working conditions of citizens and legally admitted aliens; and employment of illegal aliens under such conditions can diminish the effectiveness of labor unions. These local problems are particularly acute in California in light of the significant influx into that State of illegal aliens from neighboring Mexico.

De Canas v. Bica, 424 U.S. at 356-57.

Given the incentives to hire cheaper illegal immigrant workers and the lack of any realistic enforcement threat, employers apparently chose to preferentially hire illegal immigrants. "[N]atives account for 61 percent of the net growth in the number of people 18 to 64 in the United States, yet they earned only 9 percent of the net increase in jobs between March 2000 and March 2005."[39]

Evidence at trial showed that the employment of illegal immigrants has also lowered the wages paid to native-born workers. Respondents' Brief, at Add19-21. "[Professor George J.] Borjas [of Harvard University] calculated that the average weekly earnings of native-born men as a group would be reduced by 3 percent to 4 percent," Congressional Budget Office, *The Role of Immigrants in the U.S. Labor Market*, ("CBO Study"), November 2005, at 23, *citing*, George J. Borjas, "The Labor Demand Curve *Is* Downward Sloping: Re-examining the Impact of Immigration on the Labor Market," 18 *Quarterly Journal of Economics*, no. 4 (2003), pp. 1335-1374.

This wage decrease is not equally shared. Professor Borjas noted that "high school dropouts" would experience the "largest adverse impact [on wages] . . . about nine percent lower than they would be in the absence of increased competition from foreign-born workers." CBO Study, *supra*, 23-24.[40]

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[39] Steve Camarota, *Dropping Out: Immigrant Entry and Native Exit From the Labor Market 2000-2005*, Center for Immigration Studies, 2006, www.cis.org/node/264.

[40] *See, also*, Steven Camarota, *From Bad to Worse: Unemployment and Underemployment Among Less-Educated U.S.-Born Workers, 2007 to 2010*, Center for Immigration Studies, Aug. 27, 2010, www.cis.org/bad-to-worse.

Early in this case, the District Court below recognized this concern:

> People disagree whether the great number and continuing flow of unauthorized workers into the United States has more benefits than costs. But no one can disagree that the costs and benefits accrue differently to different people in our society. It is the responsibility of our elected representatives in Congress and in our legislatures to strike the balance among those competing social and economic interests.
> ...
> The balance now struck is in favor of an economy for those who may work in the United States. *See Incalza v. Fendi N. Am., Inc.*, 479 F.3d 1005, 1011 (9th Cir. 2007) ...
> Those who suffer the most from unauthorized alien labor are those whom federal and Arizona law most explicitly protect. They are the competing lawful workers, many unskilled, low-wage, sometimes near or under the margin of poverty, who strain in individual competition and in a wage economy depressed by the great and expanding number of people who will work for less. (Facts Ex. 22I at 1.)

Ariz. Contractors Ass'n v. Napolitano, Nos. CV07-1355-PHX-NVW, CV07-1684-PHX-NVW, Dec. 21, 2007, 2007 WL 4570303, at *6.

Seen through this lens, Petitioners' conflict preemption argument is that Congress intended low-income Americans to bear the brunt of their "balance." Congress appeared to intend the opposite result. In explaining the savings clause, for example, the House Judiciary Committee said that the preemption provision was not intended to

"undermine or diminish in any way labor protections in existing laws." H.R. Rep. 99-115(I) at 58.

Absent clear congressional ouster, States have the authority to act to prevent these "local problems." *De Canas v. Bica*, 424 U.S. at 356-57. Nothing in conflict preemption theory suggests otherwise, especially where Congress spoke directly.

C) Federal Non-Enforcement Is Insufficient to Preempt State Action Consistent with Congressional Intent

The burden to preempt a State law targeting illegal, as opposed to legal, immigrants is very high. "But if the Federal Government has by uniform rule prescribed what it believes to be appropriate standards for the treatment of an alien subclass, the States may, **of course**, follow the federal direction." *Plyler v. Doe*, 457 U.S. 202, 219 n. 19 (1982) (emphasis added).

As shown above, Congress decided to prohibit the employment of illegal immigrants. The enforcement agencies chose not to enforce the immigration laws in the workplace. Now the agencies ask this Court to decide which "uniform rule" prescribes the "appropriate standards for the treatment of an alien subclass, the States may, of course, follow." *Plyler*, 457 U.S. at 219. The statute? Or the conflicting agency's memoranda?

The Court should not ratify an "unauthorized assumption by [the] agency of [a] major policy decisio[n] properly made by Congress." *Bureau of Alcohol, Tobacco and Firearms v. Federal Labor Relations Authority*, 464 U.S. 89, 97 (1983), *quoting, American Ship Building Co. v. NLRB*, 380 U.S. 300,

318 (1965). Similarly, while reviewing courts should uphold an agency's reasonable and defensible constructions of its enabling statute, they must not "rubberstamp . . . administrative decisions that they deem inconsistent with a statutory mandate or that frustrate the congressional policy underlying a statute." *Id., quoting NLRB v. Brown*, 380 U.S. 278, 291-292 (1965).

There is some authority that the failure of federal enforcement alone can justify state action:

> And [*Pennsylvania v.*] *Nelson*[, 350 U.S. 497, 500 (1956)] stated that even in the face of the general immigration laws, States would have the right 'to enforce their sedition laws at times when the Federal Government has not occupied the field and is not protecting the entire country from seditious conduct.

De Canas v. Bica, 424 U.S. at 362-63.

But it may not be necessary to reach that point. Traditional conflict preemption doctrines negate Petitioners' "balance" argument. Employers can comply with both federal and state law, just as they must obey both §§ 1324 and 1324a.

Congress must clearly and manifestly intend to oust the State's power:

> Only a demonstration that complete ouster of state power including state power to promulgate laws not in conflict with federal laws was "the **clear and manifest purpose of Congress**" would justify that conclusion. *Florida Lime & Avocado Growers v. Paul*, [373 U.S.] at 146.

De Canas v. Bica, 424 U.S. 351, 357 (1976) (emphasis added); *Wyeth v. Levine*, __ U.S. __, __, 129 S.Ct. 1187, 1194-95 (2009) ("historic police powers of the

States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress"). It is not enough just to have "strong evidence" of "congressional intent to preempt." *Toll v. Moreno*, 458 U.S. 1, 13 n. 18 (1982).

In light of the collapse of interior immigration law enforcement, to adopt Petitioners' position is to do what the District Court warned about: "unless we take ineffective enforcement to be the 'real' federal policy from which state law must not deviate." *Ariz. Contractors Ass'n v. Candelaria*, 534 F.Supp.2d at 1055. There is no evidence that was Congress' intent in 1986, in 1996, or today.

Arizona's attempt to address these problems is consistent with federal law. *Altria Group v. Good*, __ U.S. at __, 129 S.Ct. at 543 ("the purpose of Congress is the ultimate touchstone" for preemption). Preemption is not warranted.

CONCLUSION

For the foregoing reasons, *Amicus Curiae* respectfully requests this Court to affirm the decision below.

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October 28, 2010

APPENDIX

Response to Freedom of Information Act Request for Information About Workplace Immigration Law Enforcement Activities.

U.S. Department of Homeland Security
800 North Capitol Street NW, #585
Washington, DC 20536-5009

U.S. Immigration and Customs Enforcement

September 22, 2010

Mr. Barnaby Zall
Law Offices of Weinberg, Jacobs & Tolani, LLP
11300 Rockville Pike, Suite 1200
Rockville, MD 20852

RE: FOIA Case Number 2010 FOIA5627

Dear Mr. Zall:

This is in response to your Freedom of Information ACT (FOIA) requests to U.S. Immigration and Customs Enforcement (ICE), dated July 9, 2010. You have requested (1) the number of Worksite Arrests and (2) the number of Notices of Intent to Fine for the years 2004, 2005, 2006, 2007, 2008, 2009, and 2010.

Your request has been processed under the FOIA, 5 U.S.C. § 552. With respect to part one of your request, a search of the ICE Office of Homeland

Security Investigations[1] (HIS) located the following information that originated from the Treasury Enforcement Communication System (TECS) database:

Total Number of Worksite Enforcement Arrests

Fiscal Year	Criminal Arrests	Administrative Arrests
2004	160	685*
2005*	176	1116*
2006*	716	3667*
2007	863	4077
2008	1103	5184
2009	444	1654
2010**	297	814

*Prior to fiscal year 2007, (ICE did not require administrative arrest statistics to be entered into TECS. Therefore, the administrative arrest statistics for fiscal years 2004, 2005, and 2006 may not reflect the total number of administrative arrests made by ICE during that period.

**As of July 12, 2010.

[1]Formerly the ICE Office of Investigations

With respect to part two of your request, a search of ICE HIS located the following information:

Number of Notices of Intent to Fine

Fiscal Year	Notices of Intent to Fine
2004	4
2005	8
2006	0
2007	22
2008	32
2009	172
2010	239

Provisions of the FOIA allow us to recover part of the cost of complying withyour request. In this instance, because the cost is below the $14 minimum, there is no charge.[2]

If you need to contact our office again about this matter, please refer to FOIA case number 2010FOIA5627. This office can be reached at (202) 732-0200.

Sincerely,

Catrina M. Pavlik-Keenan
FOIA Officer

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[2]6 CFR § 5.11(d)(4).

AMICUS CURIAE BRIEF

Supreme Court, U.S.
FILED
SEP 8 - 2010
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No. 09-115

IN THE

Supreme Court of the United States

CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA *et al.*,

Petitioners,

v.

MICHAEL B. WHITING *et al.*,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF OF *AMICI CURIAE* ASIAN AMERICAN JUSTICE CENTER, A MEMBER OF THE ASIAN AMERICAN CENTER FOR ADVANCING JUSTICE, *ET AL.*, IN SUPPORT OF PETITIONERS

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Griggs v. *Duke Power Co.*,
401 U.S. 424 (1971) 11

Hoffman Plastic Compounds, Inc. v. NLRB,
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Int'l Paper Co. v. Ouellette,
479 U.S. 481 (1987) 26

Lewis v. City of Chicago,
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Cited Authorities

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Saint Francis College v. Al-Khazraji,
481 U.S. 604 (1987) 11

Watkins v. Scott Paper Co.,
530 F.2d 1159 (5th Cir. 1976) 12

Statutes and Codes

Basic Pilot Program Extension and Expansion Act of 2003, Pub. L. No. 108-156, 117 Stat. 1944 18

Department of Homeland Security Appropriations Act, Pub. L. No. 111-83, § 547, 123 Stat. 2177 25

Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, Div. C, 110 Stat. 3009-546 ..... 9, 15, 17

Immigration Reform and Control Act of 1986, Pub. L. No. 99-603, 100 Stat. 3359 ..... 7, 9, 12

Title VII of the Civil Rights Act of 1964
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Title 42, section 1981	11

Other Authorities

60 Fed. Reg. 7885 (Feb. 7, 1995) 14

Alexandra Marks, *With E-Verify, Too Many Errors to Expand Its Use?*, The Christian Science Monitor, July 7, 2008, *available at* http://www.csmonitor.com/2008/0707/p02s01-usgn.html 24

Caroline Isaacs, *Sanctioning Arizona: The Hidden Impacts of Arizona's Employer Sanctions Law* (American Friends Service Committee Jan. 2009) 24

Congressional Record
Volume 131, at S11414-03
(daily ed. Sept. 13, 1985) 14
Volume 132, at H9708-02
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Volume 149, at H9896
(daily ed. Oct. 28, 2003) 18
Volume 154, at H7589
(daily ed. July 30, 2008) 21

Cited Authorities

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Daniel González, *Taunts, Threats as Employer-Sanctions Law Nears*, The Arizona Republic, Sept. 30, 2007, *available at* ww.azcentral.com/arizonarepublic/news/articles/0930backlash0930.html. 27

Dena Bunis, *Employment verification days are numbered*, Orange County Register, May 6, 2008, *available at* http://www.ocregister.com/ocregister/news/local/immigration/article_2035598.php. 24

Federal Acquisition Regulation, 73 Fed. Reg. 67,651 (Nov. 14, 2008) 16

House of Representatives Reports
No. 99-682(I) 13
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Immigration Verification Subgroup of the Interagency Working Group on Immigration, *Employment Verification Pilots: Anti-Discrimination Concerns and Recommendations* (Sept. 26, 1995) 15

Institute for Survey Research, Temple University, and Westat, *Findings of the Basic Pilot Program Evaluation* (June 2002) ..... passim

Cited Authorities

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National Immigration Law Center, *How Errors in Basic Pilot/E-Verify Databases Impact U.S. Citizens and Lawfully Present Immigrants* (April 2008) 24

Office of the Inspector General, Social Security Administration, *Accuracy of the Social Security Administration's Numident File* (Dec. 2006) (A-08-06-26100), *available at* http://www.ssa.gov/oig/ADOBEPDF/A-08-06-26100.pdf. 19

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U.S. Commission on Civil Rights, *The Tarnished Golden Door — Civil Rights Issues in Immigration* (Sept. 1980) 12

U.S. General Accounting Office, *Immigration Reform: Employer Sanctions and Questions of Discrimination* (Mar. 1990) (GGD-90-62) 14

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INTEREST OF *AMICI CURIAE*[1]

The *amici curiae* listed below are non-profit organizations that share a common interest in advancing and protecting the civil rights of all persons, including those of immigrants:

- Asian American Justice Center
- Anti-Defamation League
- Asian American Institute
- Asian American Legal Defense and Education Fund
- Asian Law Caucus
- Asian Pacific American Legal Center of Southern California
- LatinoJustice PRLDEF
- Lawyers' Committee for Civil Rights Under Law
- League of United Latin American Citizens
- Legal Aid Society – Employment Law Center
- Los Abogados Hispanic Bar Association
- National Council of La Raza
- National Day Laborer Organizing Network
- National Employment Law Project
- Southern Poverty Law Center

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1. No counsel for a party authored this brief in whole or in part, and no such counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amici curiae*, their members, or their counsel made a monetary contribution to its preparation or submission. The parties have consented to the filing of this brief. The letters of consent have been filed with, or will be sent to, the Clerk.

Each organization is committed to preventing discrimination against employees, including those who may look or sound foreign. Each organization has a strong interest in opposing state laws that regulate employment of unauthorized workers, including the Legal Arizona Workers Act because those laws interfere with federal laws specifically designed to prevent discrimination. *Amici* support the Petitioners and submit that the decision of the Court of Appeals for the Ninth Circuit should be reversed. This brief highlights Congress' long-standing and well-documented desire to prevent the discrimination resulting from mandatory use of the E-Verify system. The specific interest of each *amicus* is described in more detail below.

The **Asian American Justice Center** ("AAJC") is a national non-profit, non-partisan organization whose mission is to advance the human and civil rights of Asian Americans through advocacy, public policy, public education, and litigation. Collectively, AAJC and its affiliates within the Asian American Center for Advancing Justice—the Asian American Institute, the Asian Law Caucus, and the Asian Pacific American Legal Center of Southern California—have over fifty years of experience in litigation, public policy, advocacy, and community education on discrimination issues. AAJC has advanced its long-standing concern for protecting the rights of immigrants—a significant proportion of whom are Asian Americans—by filing briefs in immigration cases and educating policymakers and the public on the need for fair and humane immigration laws.

The **Anti-Defamation League** ("ADL") was organized in 1913 to fight anti-Semitism and all forms of bigotry and to defend democratic ideals. As an organization with a long and proud tradition of defending civil liberties for all, ADL has in recent years taken a lead role in exposing the virulent anti-immigrant and xenophobic rhetoric that has risen to the surface as part of the national debate over immigration. ADL speaks out against discrimination and bigotry and advocates a meaningful policy that honors America's promise as a nation of immigrants.

The **Asian American Institute** ("AAI") is a pan-Asian, non-partisan, not-for-profit organization located in Chicago, Illinois, whose mission is to empower and advocate for the Asian American community through advocacy, coalition-building, education, and research. AAI is a member of the Asian American Center for Advancing Justice, whose other members include the Asian American Justice Center, Asian Law Caucus, and Asian Pacific American Legal Center. AAI's programs include community organizing, leadership development, and legal advocacy. AAI is deeply concerned about the discrimination that Asian Americans face in hiring and employment practices, including discrimination against those who look or sound foreign. Laws such as the Arizona statute worsen discrimination against Asian American members of the workforce and frustrate Congress' intent to balance immigration control concerns with discrimination concerns. Accordingly, AAI has a strong interest in the outcome of this case.

The **Asian American Legal Defense and Education Fund** ("AALDEF"), founded in 1974, is a national organization that protects and promotes the

civil rights of Asian Americans. By combining litigation, advocacy, education, and organizing, AALDEF works with Asian American communities across the country to secure human rights for all. AALDEF has a long history of fighting discrimination in employment. The Arizona legislation will result in discrimination against Asian Americans.

Founded in 1972, the **Asian Law Caucus** ("ALC") is the nation's oldest legal organization advancing the civil rights of Asian American and Pacific Islander communities. ALC is a member of the Asian American Center for Advancing Justice, whose other members include the Asian American Institute, Asian American Justice Center, and Asian Pacific American Legal Center. ALC has a long history of protecting low-wage immigrant workers and regularly engages in broad community education on pressing civil and employment rights issues. ALC is committed to ending discrimination and unfair treatment of vulnerable individuals including those who may be impacted by the mandatory implementation of the E-Verify program.

The **Asian Pacific American Legal Center of Southern California** ("APALC") was founded in 1983 and is the nation's largest non-profit public interest law firm devoted to the Asian Pacific American community. APALC is a member of the Asian American Center for Advancing Justice, whose other members include the Asian American Institute, Asian American Justice Center, and Asian Law Caucus. Serving 15,000 individuals and organizations each year, APALC has expertise in workers' rights, anti-discrimination, immigrant welfare, immigration and citizenship, voting

rights, and hate crimes. APALC represents and advocates for immigrants through public advocacy, community education, and litigation to ensure their protection against discrimination, and it has assisted individuals wrongly identified under the E-Verify system. APALC has a long-standing interest in this case because the mandatory implementation of a flawed employment verification program significantly impacts Asian Pacific Americans.

LatinoJustice PRLDEF (formerly known as the Puerto Rican Legal Defense and Education Fund) is a non-profit, non-partisan civil rights organization founded in New York City in 1972. Its continuing mission is to advocate for and defend the constitutional rights of all Latinos under the law. It seeks to accomplish this by promoting the civic participation of the pan-Latino community, cultivating Latino community leaders, and bringing impact litigation addressing the basic civil and human rights of Latinos in employment, education, language, fair housing, immigrants' and migrants' rights. During its 38-year history, LatinoJustice has litigated numerous cases on behalf of the Latino community against multiple forms of discrimination.

The **Lawyers' Committee for Civil Rights Under Law** ("Lawyers' Committee") is a tax-exempt, non-profit civil rights organization that was founded in 1963 by the leaders of the American bar, at the request of President John F. Kennedy, in order to help defend the civil rights of minorities and the poor. Its Board of Trustees presently includes several past presidents of the American Bar Association, past Attorneys General of

the United States, law school deans and professors, and many of the nation's leading lawyers. The Lawyers' Committee has been involved in challenging state statutes and municipal ordinances that require private citizens to act as immigration officials and provide incentives for employers to discriminate against authorized workers of color in violation of federal civil rights laws.

The **League of United Latin American Citizens** ("LULAC") has a mission to advance the economic condition, educational attainment, political influence, housing, health and civil rights of the Hispanic population of the United States. LULAC achieves its mission through advocacy, education and litigation, including filing briefs in immigration and civil rights cases that have a substantial impact on the Hispanic population and other ethnic groups.

The **Legal Aid Society – Employment Law Center** ("LAS-ELC") is a nonprofit legal services organization, founded in 1916, that litigates cases nationwide on behalf of low-wage workers, particularly those who belong to traditionally subordinated communities. Through its National Origin, Immigration, and Language Rights Program, LAS-ELC endeavors to protect the rights of individuals who face discrimination because they belong to a particular ethnic community, because they or their ancestors immigrated to the United States, or because of their linguistic or cultural characteristics. As part of this work, LAS-ELC has litigated numerous cases vindicating the ability of workers to protect their legal rights irrespective of their immigration status. LAS-

ELC has a strong interest in seeing the decision of the Ninth Circuit reversed, because allowing it to stand will subject countless workers to unlawful discrimination on the basis of their actual or perceived national origin or immigration status – discrimination that the Immigration Reform and Control Act of 1986 sought to prevent.

Los Abogados Hispanic Bar Association ("Los Abogados") is an Arizona-based non-profit and non-partisan organization that focuses on promoting the business of the Hispanic legal profession within the state of Arizona. Members of Los Abogados include private and public attorneys, judges, businesspersons, paralegals, and law students. Los Abogados has actively opposed actions directed at immigrants that can be used to marginalize Hispanics in general. This has been done by participating in community-based outreach activities, assisting in the prosecution of civil rights lawsuits and investigations of civil right abuses, and educating Arizona's courts, media, and higher-learning institutions on issues that negatively affect immigrants and Hispanics.

The **National Council of La Raza** ("NCLR") is a private, non-profit, non-partisan organization established in 1968 to reduce poverty and discrimination and improve life opportunities for Hispanic Americans. NCLR works toward this goal through two primary, complementary approaches: capacity-building assistance to support and strengthen Hispanic community-based organizations and applied research, policy analysis and advocacy. NCLR believes that state laws that regulate

employment of immigrants and mandate the use of a flawed employment verification program result in large-scale discrimination against workers perceived to be foreign, and are preempted by federal immigration laws.

The **National Day Laborer Organizing Network** ("NDLON") is a nationwide coalition of day laborers and non-profit agencies that work with and for day laborers. Its mission is to improve the lives of day laborers in the United States. The aims of the coalition include working for the repeal or invalidation of laws that restrict day laborers' rights to seek and receive employment with full workplace protections. NDLON considers it among its highest strategic priorities to vindicate and defend day laborers' civil and workplace rights. NDLON has expended resources to respond to the Arizona statute. Additionally, NDLON feels many of its constituents have been adversely impacted by the Arizona statute. Among NDLON's member organizations is the Macehualli day labor center in Phoenix, Arizona.

The **National Employment Law Project** ("NELP") is a non-profit organization that has worked for 40 years to advance the workplace rights of low-wage workers, including immigrant workers. In partnership with community groups, unions, state and federal public agencies, NELP seeks to ensure that all employees, especially the most vulnerable ones, receive the basic workplace protections guaranteed in our nation's labor and employment laws. NELP has litigated and participated as *amicus* in numerous cases addressing the rights of low-wage and immigrant workers under federal and state labor and employment laws.

Founded in 1971, the **Southern Poverty Law Center** ("SPLC") has litigated numerous civil rights cases on behalf of women, people of color, prisoners, immigrants and other victims of discrimination. Although the SPLC's work is concentrated in the South, its attorneys appear in courts throughout the country to ensure that all people receive equal and just treatment under federal and state law.

SUMMARY OF ARGUMENT

For more than forty years, the United States has had a firm national commitment to prohibiting discrimination in employment on the basis of race or national origin. That commitment extends to prohibiting not only practices that are motivated by racially discriminatory or nativist concerns, but also practices that, whatever their motivation, have a disparate impact.

In enacting recent immigration laws, Congress struck a careful balance between this longstanding national nondiscrimination policy and the federal interest in eliminating the incentive for illegal immigration created when employers hire individuals who are not authorized to work in the United States. In particular, when Congress adopted comprehensive immigration reform in the Immigration Reform and Control Act of 1986, it included a strong nondiscrimination provision within the statute. Similarly, when Congress created an electronic employment verification system ("E-Verify") for employers in the Illegal Immigration Reform and Immigrant

Responsibility Act of 1996, it made that system both voluntary and temporary to enable periodic reevaluation and to avoid entrenching discrimination that might occur.

Arizona's Legal Arizona Workers Act ("LAWA") upsets Congress' carefully crafted balance. Whatever its stated purpose, Arizona's law has the effect of fostering discrimination prohibited by federal law. To avoid LAWA's sanctions for employing unauthorized workers and reduce compliance costs, employers face a powerful incentive not to consider or employ workers who they believe look or sound foreign, because they presume such workers are unauthorized or, at a minimum, will have problems proving they are authorized to work. Because LAWA undercuts federal policy, it is preempted.

ARGUMENT

I. STATE LAWS REQUIRING MANDATORY PARTICIPATION IN E-VERIFY FRUSTRATE CONGRESS' INTENT TO BALANCE DISCRIMINATION CONCERNS WITH CONTROL OF ILLEGAL IMMIGRATION.

1. For nearly a half century, the prohibition on discrimination in employment has represented a "fundamental public policy" of the United States. *See Bob Jones Univ. v. United States*, 461 U.S. 574, 594 (1983). That policy is articulated in Title VII of the Civil

Rights Act of 1964, which forbids discrimination on the basis of "race" or "national origin." 42 U.S.C. § 2000e-2(a); *see also* 42 U.S.C § 1981 (forbidding discrimination on the basis of race in making or enforcing contracts, including employment contracts); *Saint Francis College v. Al-Khazraji*, 481 U.S. 604 (1987) (treating discrimination on the basis of national origin as racial discrimination within the meaning of § 1981).

The federal prohibition on race- or national origin-based discrimination exteads beyond practices that are motivated by animus against members of racial minorities or particular nationalities to reach practices that have a disparate impact on such individuals as well. *See Lewis v. City of Chicago*, 130 S. Ct. 2191 (2010); *Griggs* v. *Duke Power Co.*, 401 U.S. 424, 431 (1971) (interpreting Title VII to "proscrib[e] not only overt discrimination but also practices that are fair in form, but discriminatory in operation"); 42 U.S.C. § 2000e-2(a), (k).

Thus, in a variety of situations, this Court and lower federal courts have struck down employment practices that have a disparate impact on members of particular racial groups or persons of a particular national origin. *See, e.g., Albermarle Paper Co. v. Moody*, 422 U.S. 405 (1975) (pre-employment tests that had a discriminatory impact on African-American employees were not job-related); *Bonilla v. Oakland Scavenger Co.*, 697 F.2d 1297 (9th Cir. 1982) (policy assigning better jobs with higher pay and more guaranteed hours to shareholder-employees, who were all of Italian ancestry, had adverse impact on African-American and Spanish-surnamed

employees); *Watkins v. Scott Paper Co.*, 530 F.2d 1159 (5th Cir. 1976) (high school diploma prerequisite had disparate impact on African-American employees and was not required by business necessity).

2. The history of federal employment verification requirements reflects Congress' consistent efforts to safeguard equal employment opportunity throughout its efforts to reduce illegal immigration by reducing the economic incentives for individuals to enter the United States, beginning with the Immigration Reform and Control Act of 1986 ("IRCA"), Pub. L. No. 99-603, 100 Stat. 3359.

Prior to IRCA, during the early 1980's, a number of official reports had addressed the potential for discrimination in employer verification systems. Most notably, a 1980 report to the President and Congress from the U.S. Commission on Civil Rights strongly opposed employer sanctions legislation because the likely consequences included discrimination and placement of employers in the role of immigration officers. U.S. Commission on Civil Rights, *The Tarnished Golden Door— Civil Rights Issues in Immigration* (Sept. 1980), at 74.

Against this backdrop, when Congress initially addressed the employment of unauthorized individuals in the Immigration Reform and Control Act of 1986, Congress specifically sought to reduce the danger of racial and national origin discrimination. While Congress prohibited employers from hiring undocumented immigrants, it included a strict *scienter* requirement

(8 U.S.C. § 1324a(a)(1)(A)); imposed relatively mild penalties for initial infractions (*id.* § 1324a(e)(4)); and balanced the ban on knowingly hiring unauthorized workers with a corresponding prohibition on discrimination on the basis of national origin or citizenship status (*id.* § 1324b(a)(1)). Congress carefully calibrated the incentives employers faced by imposing the same graduated scale of monetary penalties for violating section 1324a (ban on hiring unauthorized workers) as it did for violating section 1324b (ban on discrimination). *Compare id.* § 1324a(e)(4)(A) *with id.* § 1324b(g)(2)(B)(iv).

That calibration reflected Congress' express concern that immigration reform should not result in discrimination. The House Report accompanying IRCA pointed to the testimony of numerous witnesses who "expressed their deep concern that the imposition of employer sanctions will cause extensive employment discrimination against Hispanic-Americans and other minority group members. These witnesses are genuinely concerned that employers, faced with the possibility of civil and criminal penalties, will be extremely reluctant to hire persons because of their linguistic or physical characteristics." H.R. Rep. No. 99-682(I), *as reprinted in* 1986 U.S.C.C.A.N. 5649, 5672. During the debate in Congress, it was observed that, "when an employer, particularly one who does not have elaborate personnel and legal departments, is faced with the potential of civil and criminal penalties, that employer, for totally nonracist reasons, may, when in doubt with respect to the legal status of an applicant, decide to protect himself by excluding that applicant." 132 Cong. Rec. H9708-02 (daily ed. Oct. 9, 1986) (statement of Rep. Berman). *See*

also 131 Cong. Rec. S11414-03 (daily ed. Sept. 13, 1985) (statement of Sen. Levin) ("We do not want people discriminated against because they look or sound foreign.").

In part responding to these concerns, IRCA contained reporting requirements directing the General Accounting Office ("GAO") to determine if existing employer sanctions were carried out satisfactorily, if they caused a pattern of discrimination against U.S. citizens or other authorized workers, and if sanctions caused an unnecessary regulatory burden on employers. The GAO's final report found that the implementation of employer sanctions had resulted in a widespread pattern of discrimination against authorized workers and that many of these discriminatory practices had apparently resulted from IRCA. The 1990 GAO report further noted significant employer confusion in complying with verification provisions. U.S. General Accounting Office, *Immigration Reform: Employer Sanctions and Questions of Discrimination* (Mar. 1990) (GGD-90-62), at 3-4, *available at* http://archive.gao.gov/d24t8/140974.pdf.

The Executive Branch also expressed a commitment to ensuring that any employer verification program operated in a manner consistent with fair employment laws. In 1995, President Clinton issued a directive to the heads of all executive departments and agencies proposing a blueprint of policies and priorities for curtailing illegal immigration. That directive reiterated that strong anti-discrimination measures must continue to protect the privacy and civil rights of all persons lawfully in the United States and directed an interagency effort to ensure that these rights were vigorously protected. 60 Fed. Reg. 7885 (Feb. 7, 1995).

In response to President Clinton's directive, in 1995 the Immigration Verification Subgroup of the Interagency Working Group on Immigration (the "Working Group") issued a report considering concerns of discrimination, particularly in any pilot programs for new methods of employment verification. The report stated that any review of employment verification pilot programs should address potential discrimination in the design of the pilots themselves and ensure that an effective evaluation mechanism was in place to determine whether the pilots led to discrimination. The Working Group report also recommended that pilot design should safeguard against prescreening of applicants prior to hire, selective or inconsistent implementation of the verification process, and unauthorized use of verification information for the purpose of harassment or discrimination. Immigration Verification Subgroup of the Interagency Working Group on Immigration, *Employment Verification Pilots: Anti-Discrimination Concerns and Recommendations* (Sept. 26, 1995).

3. The E-Verify program thus must be understood in light of a consistent preexisting commitment to ensuring that immigration reform involving employment verification be accomplished without undermining federal fair employment law.

E-Verify has its origins in the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 ("IIRIRA"), Pub. L. No. 104-208, 110 Stat. 3009-546

(codified as amended at 8 U.S.C. § 1324a). The initial program for verifying individuals' eligibility for employment was known as the "Basic Pilot" because it was (and still is) a means for the Immigration and Naturalization Service ("INS") (whose functions are now performed by three agencies under the newly created Department of Homeland Security ("DHS")) and Social Security Administration ("SSA") to evaluate on a pilot basis methods of electronically verifying the employment authorization of newly hired employees. Because of its pilot status, E-Verify was voluntary and experimental, and remains so to this day.[2] Initially, E-Verify was to run for four years; later legislation has reauthorized it on a *temporary* and *voluntary* basis.

Congress specifically targeted discrimination in 1996 when it crafted IIRIRA and established E-Verify: "[T]he potential impact of automated employment verification on discrimination was a topic frequently discussed prior to the implementation of the pilots." Institute for Survey Research, Temple University, and Westat, *Findings of the Basic Pilot Program Evaluation* (June 2002), at 136. One of the four primary goals of the IIRIRA pilot programs, including E-Verify, was to "[r]educe discrimination." *Id.* at 28-29; *see* S. Rep. 104-249, at 59-60 (1996) (statement by Sens. Simon and Kennedy

2. A federal regulation conditions eligibility for certain federal contracts on participation in E-Verify. Federal Acquisition Regulation, 73 Fed. Reg. 67,651 (Nov. 14, 2008); *see Chamber of Commerce v. Napolitano*, 648 F. Supp. 2d 726, 736 (D. Md. 2009). That regulation, however, does not make E-Verify mandatory for all employers and certainly does not negate the concerns regarding discrimination that Congress expressed at the time it established E-Verify as a voluntary program.

recognizing need for safeguards against discrimination and supporting pilot programs as providing proper balance). IIRIRA itself provides for the establishment of "a pilot program confirmation system" designed and operated "to have reasonable safeguards against the system's resulting in unlawful discriminatory practices based on national origin or citizenship status, including—(A) the selective or unauthorized use of the system to verify eligibility; (B) the use of the system prior to an offer of employment; or (C) the exclusion of certain individuals from consideration for employment as a result of a perceived likelihood that additional verification will be required, beyond what is required for most job applicants." IIRIRA § 404(d)(4).

A 2002 report commissioned by the INS to fulfill a congressionally mandated reporting requirement with respect to E-Verify repeated the long-standing concern with the dangers of discrimination posed by wholesale, reflexive imposition of electronic employment verification. Entitled "Findings of the Basic Pilot Program Evaluation" (the "2002 Evaluation"),[3] the report describes the history of Congress' concern about discrimination and analyzes the relationship between E-Verify and discrimination. That report noted, among other things, that "[a]s a result of years of debate and widely held concerns about the probable discriminatory impact of employer sanctions on foreign-appearing and foreign-sounding workers, IRCA included significant anti-discrimination provisions for unfair immigration-related employment practices." 2002 Evaluation at 9.

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3. Institute for Survey Research, Temple University, and Westat, *Findings of the Basic Pilot Program Evaluation* (June 2002) (report submitted to the INS).

4. The subsequent history of E-Verify underscores Congress' commitment to ensuring that employment verification be done in a fashion that avoids unnecessary threats to fair employment. Thus, before deciding to keep E-Verify voluntary and temporary, Congress considered the discrimination that might result from E-Verify. When Congress passed the December 2003 legislation that extended E Verify for five years and maintained it as a voluntary, temporary program, Congress had the opportunity to review extensive analysis of the discrimination that had already resulted from employers' use of E-Verify as well as the additional discrimination that could result from continued and expanded use of E-Verify.[4] *See, e.g.*, 149 Cong. Rec. H9896 (daily ed. Oct. 28, 2003) (statement of Rep. Sanchez) (describing, during debate on the Basic Pilot Program Extension and Expansion Act of 2003, the "many problems" with E-Verify found by the 2002 Evaluation, including "inaccurate and outdated information"); H. R. Rep. 108-304 pt. 1 at 22, 26-27, 43 (2003) (statements by Reps. Lee, Berman, and Conyers, et al., during debate on Basic Pilot Program Extension and Expansion Act of 2003, noting problems with E-Verify found by 2002 Evaluation). The 2002 Evaluation devotes an entire section to the impact of E-Verify on discrimination, determining that there was evidence that E-Verify caused discrimination. The 2002

4. Congress had the 2002 Evaluation in hand when it passed legislation in 2003 to extend E-Verify through November 2008 and keep the program voluntary. *See* Basic Pilot Program Extension and Expansion Act of 2003, Pub. L. No. 108-156, 117 Stat. 1944 (extending term of E-Verify and expanding availability to all fifty states, but keeping program voluntary and temporary to permit further study and evaluation).

Evaluation identifies numerous concerns regarding the links between E-Verify and discrimination.

Some of these difficulties were attributable to Government-created difficulties. For example, E-Verify uses databases containing either SSA or INS (now DHS) data. "Most Federal officials interviewed agreed that the efficient operation of the pilot program was hindered by inaccuracies and outdated information in the INS database."[5] 2002 Evaluation at 121. "[I]naccuracies in the SSA and INS databases could result in some work-authorized persons being incorrectly identified as not work-authorized." *Id.* at 137. The E-Verify databases contained errors that resulted in false tentative nonconfirmations for disproportionate numbers of Hispanics and Asians.[6] *See id.* Thus, misidentification resulted in "unintentional discrimination against foreign-born employees." *Id.* at 137. In addition, "[s]ince Hispanics and Asians are more likely than whites and blacks to be foreign-born, discrimination against foreign-born (or foreign-appearing) individuals is likely to result in increased discrimination against Hispanics and Asians in particular, as well as against foreign-born individuals generally." *Id.*

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5. A 2006 SSA study found that approximately 17.8 million SSA records contained data mismatches that could result in E-Verify nonconfirmations. Office of the Inspector General, Social Security Administration, *Accuracy of the Social Security Administration's Numident File* (Dec. 2006) (A-08-06-26100), at ii, *available at* http://www.ssa.gov/oig/ADOBEPDF/A-08-06-26100.pdf.

Other problems were due to employers' failures to follow the requirements of E-Verify. For example, there was "considerable evidence that Basic Pilot employers are using the system to prescreen applicants, although E-Verify prohibits prescreening." *Id.* at 143. This prescreening occurred because employers were reluctant to "bear the cost of training individuals who later turn out to be non-work-authorized." *Id.* at 138.

The 2002 Evaluation further found that many employers who used E-Verify wrongfully restricted or suspended the employment of existing employees who had to contest tentative nonconfirmations: "The Basic Pilot MOU prohibits the restriction of work assignments, pay cuts and other adverse actions against employees while they are contesting tentative nonconfirmations. However, employers do sometimes take adverse actions against employees who receive tentative nonconfirmations." *Id.* 117. "The possibility that the Basic Pilot program could contribute to post-hiring discrimination has been of widespread concern." *Id.* at 144. "Since individuals receiving tentative nonconfirmations are disproportionately foreign-born . . . , the impact of these actions will be discriminatory even if the employer does not intend to discriminate . . . . [I]t is reasonable to conclude that failure to follow Basic Pilot procedures during the tentative nonconfirmation period has increased

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6. A tentative nonconfirmation is the initial response from E-Verify when an employee's work authorization cannot be immediately confirmed. It does not signify that an employee is not authorized to work and is not indicative of any immigration violation.

discrimination against foreign-born individuals compared to native-born individuals in the time immediately following hire." *Id.* at 145.

Still other problems were caused by the incentives and disincentives created by E-Verify. Findings suggested "that some Basic Pilot employers are . . . disproportionately denying employment to those receiving tentative nonconfirmations." *Id.* at 140. Employees were further disadvantaged because employers often gave them no "opportunity to resolve the nonconfirmation." *Id.* at 143. "Since foreign-born employees are more likely than native-born employees to receive tentative nonconfirmations, pre-employment screening can be expected to result in discrimination . . . ." *Id.* at 140. The 2002 Evaluation explained the dynamic: "[I]f employers believe that verifying noncitizens through the Basic Pilot system is more burdensome than verifying citizens, the pilot may increase disparate treatment of noncitizens." *Id.* at 137.

5. The risk of discrimination from E-Verify remains high. A 2007 study commissioned by the INS (now DHS) reinforces this conclusion. It noted the continued "limitations of Federal data for verification purposes, the potential for workplace discrimination and privacy violations, and practical logistical considerations about larger scale implementation." Westat, *Findings of the Web Basic Pilot Evaluation* (Sept. 2007) (report submitted to DHS) ("2007 Evaluation"), at 5;[7] *see also* 154 Cong. Rec. H7589 (daily ed. July 30, 2008) (statement of Rep. Lofgren) (noting, during debate in 2008 on whether to extend E-Verify, that the 2007 Evaluation identified "numerous issues with how the

basic pilot program works"). The 2007 Evaluation also observed that, while federal databases used for verification had improved, "further improvements are needed, especially if the Web Basic Pilot Program becomes a mandated national program. . . . Most importantly, the database used for verification is still not sufficiently up to date to meet the IIRIRA requirement for accurate verification, especially for naturalized citizens." 2007 Evaluation at xxi. "Reducing the erroneous tentative nonconfirmation rate for naturalized citizens will take considerable time and will require better data collection and data sharing between SSA, USCIS, and the U.S. Department of State than is currently the case." *Id.* at xxvi.

Erroneous tentative nonconfirmation rates due to database deficiencies are a critical shortcoming of E-Verify that produce discrimination. The 2007 Evaluation recognized that the "impact of receiving an erroneous tentative nonconfirmation on discrimination can be viewed as the product of two factors—the degree to which specified groups differ in their tentative nonconfirmation rates and the size of the negative impact of receiving erroneous tentative nonconfirmations on those receiving them." *Id.* at 96.

With respect to differences in tentative nonconfirmation rates, the 2007 Evaluation reported that the "erroneous tentative nonconfirmation rate for

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7. An electronic copy of the 2007 Evaluation may be found on the website of U.S. Citizenship and Immigration Services ("USCIS") at: http://www.uscis.gov/files/article/WebBasicPilotRprtSept2007.pdf.

employees who were eventually found to be work-authorized is approximately 30 times higher for foreign-born employees than for U.S.-born employees."[8] *Id.* at 97. The "negative impact" of receiving a tentative nonconfirmation can be significant. As discussed, E-Verify procedures prohibit employers from taking action against workers based only on tentative nonconfirmations. Just as feared, however, some employers have chosen to disregard this prohibition, harming both citizens and other authorized workers. *See id.* at 100.

For example, an employer in Phoenix—an owner of fast-food restaurants—testified before a House subcommittee that the Arizona statute, which includes stiff penalties, might cause employers to prefer "applicants who look like they . . . are U.S. citizens."[9] Authorized workers who receive tentative nonconfirmations experience discrimination even after they are hired. These employees are denied work assignments, denied job benefits, and fired from their jobs.[10] As a result of receiving a tentative nonconfirmation, one employee was terminated two hours after being hired.[11] Another person received a job offer only to see it rescinded after receiving a tentative

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8. A December 2009 study commissioned by DHS found that the erroneous tentative nonconfirmation rate remains high for foreign-born employees: the erroneous tentative nonconfirmation rate in mid-2008 for foreign-born employees was twenty times higher than for U.S.-born employees. Westat, *Findings of the E-Verify Program Evaluation* (Dec. 2009) (report submitted to DHS) at 210; *available at* http://www.uscis.gov/USCIS/E-Verify/E-Verify/Final%20E-Verify%20Report%2012-16-09_2.pdf.

nonconfirmation, even though he later offered the employer confirmation from the SSA that he was authorized to work in the United States.[12] Some employees did not receive training while contesting tentative nonconfirmations, and some employees were paid less. 2007 Evaluation at 77.

6. Faced with this information, Congress extended E-Verify for only a temporary period and without making participation mandatory. Indeed, although Congress has had the opportunity to make E-Verify participation mandatory for all employers each time it has extended the program, Congress has declined to do so, most

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9. Dena Bunis, *Employment verification days are numbered*, Orange County Register, May 6, 2008, *available at* http://www.ocregister.com/ocregister/news/local/immigration/article_2035598.php.

10. Moreover, a report by a non profit immigrant rights program found that the Arizona statute "has produced fear and resentment in the immigrant community." Caroline Isaacs, *Sanctioning Arizona: The Hidden Impacts of Arizona's Employer Sanctions Law* (American Friends Service Committee, Jan. 2009), at iii.

11. Alexandra Marks, *With E-Verify, Too Many Errors to Expand Its Use?*, The Christian Science Monitor, July 7, 2008, *available at* http://www.csmonitor.com/2008/0707/p02s01-usgn.html.

12. National Immigration Law Center, *How Errors in Basic Pilot/E-Verify Databases Impact U.S. Citizens and Lawfully Present Immigrants* (April 2008) *available at* http://www.nilc.org/dc_conf/flashdrive09/Worker-Rights/emp10_e-verify_impacts-USCs-2008-04-09.pdf

recently in 2009. *See* Department of Homeland Security Appropriations Act, Pub. L. No. 111-83, § 547, 123 Stat. 2177.

Congress has thus approved a program that remains voluntary, temporary and subject to ongoing study and revision. Congress has sought to avoid the unlawful discrimination that would result from a mandatory, permanent employer verification program.

Arizona's program, embodied in the mandatory, permanent requirements of the Legal Arizona Workers Act (LAWA), abandons these safeguards and careful calibrations. By making E-Verify participation mandatory and permanent, LAWA thwarts Congress' carefully considered policy of balancing controls on illegal immigration with the need to prevent discrimination against U.S. citizens and other authorized workers. LAWA directly frustrates Congress' intent not to require participation in E-Verify until steps are taken to considerably reduce the error rate and its harmful effects.

II. THE ARIZONA STATUTE AND OTHER SIMILAR STATE LAWS CONFLICT WITH FEDERAL LAW AND ARE PREEMPTED.

Amici support Petitioners' position that state laws that override Congress' decisions to keep E-Verify a temporary program and to make participation in E-Verify voluntary are preempted. As set forth in the Brief for the Petitioners, IRCA created a "comprehensive

scheme prohibiting the employment of illegal aliens in the United States." *Hoffman Plastic Compounds, Inc. v. NLRB*, 535 U.S. 137, 147 (2002). IRCA was the product of years of deliberation and of difficult compromises that carefully balanced myriad, competing policy and political concerns. *See* Brief for Petitioners at 4-8. Congress achieved this balance with deliberate precision that is reflected not only in its decisions to make E-Verify temporary and voluntary but also in how it calibrated penalties for hiring unauthorized workers and discriminating against authorized ones.

Even if the goals of federal and state law are the same, a state law "is preempted if it interferes with the methods by which the federal statute was designed to reach this goal." *Int'l Paper Co. v. Ouellette*, 479 U.S. 481, 494 (1987). Conflict preemption will invalidate a state statute that "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Geier v. American Honda Motor Co.*, 529 U.S. 861, 873 (2000). Although the Ninth Circuit held that the Arizona statute was not preempted, it relied on *De Canas v. Bica*, 424 U.S. 351 (1976), which pre-dates the enactment of IRCA.

The Arizona statute makes participation in E-Verify mandatory and permanent even though Congress made it voluntary and temporary. Requiring participation in E-Verify (and failing to include anti-discrimination provisions) upsets the careful balance struck by Congress, fundamentally altering the way Congress sought to address discrimination and the employment of unauthorized workers. In doing so, the Arizona

statute and other similar state laws have become an obstacle—thwarting Congress' intended objective of minimizing discrimination caused by E-Verify. In fact, it appears that the Arizona statute has already resulted in the types of discrimination that Congress sought to avoid. Shortly after the Arizona statute was enacted in 2007, immigration lawyers, industry groups and employers reported that they noticed "an increase in hostility toward Hispanic workers."[13]

Given the centrality of several aspects of the federal scheme that LAWA overrides, that statute must be preempted if Congress' dual goals are to be achieved.

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13. Daniel González, *Taunts, Threats as Employer-Sanctions Law Nears*, The Arizona Republic, Sept. 30, 2007, at A1.

CONCLUSION

For the foregoing reasons, the *amici curiae* respectfully submit that the Court should reverse the judgment of the Court of Appeals for the Ninth Circuit with instructions to vacate the judgment of the District Court.

Respectfully submitted,

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AMICUS CURIAE BRIEF

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Supreme Court of the United States

CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA *et al.*,
Petitioners,

v.

MICHAEL B. WHITING *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF BUSINESS ORGANIZATIONS AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

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132 Cong. Rec. H10,584 (daily ed. Oct. 15, 1986) 5

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NCSL Immigrant Policy Project, State Laws Related to Immigrants and Immigration in 2008 (rev. Jan. 27, 2009)..... 12

NCSL Immigrant Policy Project, 2009 State Laws Related to Immigrants and Immigration January 1—December 31, 2009 (rev. Dec. 1, 2009) 12

NCSL Immigrant Policy Project, 2010 Immigration-Related Laws and Resolutions in the States (rev. July 20, 2010) 11

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BRIEF OF BUSINESS ORGANIZATIONS AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

Amici curiae respectfully submit this brief in support of petitioners.[1]

INTEREST OF *AMICI CURIAE*

Amici curiae file this brief to inform the Court of the significance of this issue to businesses, large and small, in many industries. As representatives of the business community, *amici* emphasize the substantial burdens imposed on businesses by the Legal Arizona Workers Act and scores of varying laws recently enacted in other jurisdictions.

The Associated Builders and Contractors, Inc. ("ABC") is a national construction industry trade association representing nearly 25,000 individual employers in the commercial and industrial construction industry. ABC also has 78 chapters throughout the United States.

The Human Resource Initiative for a Legal Workforce ("HR Initiative") represents the views of human resource professionals in thousands of small and large U.S. employers representing every sector of the U.S. economy. HR Initiative members (the American Council on International Personnel, HR Policy

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[1] Pursuant to Rule 37.6, counsel for *amici curiae* states that no counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amici curiae*, their members, or their counsel made a monetary contribution to its preparation or submission. All parties have consented to the filing of this brief, and letters reflecting their consent have been filed with the Clerk.

Association, International Public Management Association for Human Resources, National Association of Manufacturers, and the Society for Human Resources Management) represent the front lines on employment verification and, as such, are fully committed to hiring only work-authorized individuals.

The U.S. Hispanic Chamber of Commerce ("USHCC") is the nation's largest business chamber that focuses on the needs and issues of Hispanic-owned businesses, employees and consumers. USHCC's membership includes companies and professional organizations of every size, in every industry sector, and from every region of the United States and Puerto Rico. It also serves as an umbrella organization for local, regional and statewide Hispanic chambers in the United States, Puerto Rico, Canada, Mexico, and South America.

The Chambers of Commerce of Illinois, Indiana, Kansas, Kentucky, New Jersey, and West Virginia; the Missouri Chamber of Commerce and Industry; the State Chamber of Oklahoma; the Pennsylvania Chamber of Business and Industry; the Tennessee Chamber of Commerce and Industry; the Texas Association of Business; and the Association of Washington Business are statewide organizations that are composed of and represent the interest of businesses, both large and small, as well as local chambers of commerce and other interested parties.

A brief initial word about the immigration debate underlying this case is in order. *Amici* steadfastly oppose the knowing employment of illegal immigrants. It is against federal law knowingly to em-

ploy illegal workers, and employers who violate this law are subject to an extensive (and exclusive) federal system of administration, adjudication, and penalty. The efficacy and wisdom of that choice, made by Congress nearly 25 years ago, is not at issue here. The question presented in this case instead is whether Arizona and other states and localities may make a different choice than Congress. They may not.

INTRODUCTION AND SUMMARY

In the Immigration Reform and Control Act of 1986, Congress established a uniform and comprehensive national framework governing employment verification for immigrants. Congress sought to balance the objective of preventing employment of illegal aliens with other goals, including avoiding discrimination against job applicants and limiting the burdens on employers and employees. The existence of a single nationwide system of employment verification substantially reduces the costs of compliance for employers.

The Legal Arizona Workers Act frustrates Congress's objective of establishing a uniform framework that limits the imposition of unnecessary compliance and administrative costs on employers. The severe costs and burdens occasioned by Arizona's law are exacerbated by the patchwork of overlapping and contradictory laws enacted in other jurisdictions. States and municipalities have enacted scores of laws and ordinances regulating all aspects of employment verification. Some, like the Arizona law, mandate the use of E-Verify for some or all employers. Others purport to modify the requirements of

the federal I-9 document verification program. Others create new adjudication schemes and standards, which depart from the system Congress enacted and impose harsh forms of civil and criminal sanctions on employers.

Each of these laws by itself imposes substantial costs on businesses that desire in good faith to comply with all applicable standards. Collectively, they impose an enormous financial and administrative burden on multi-state businesses, which must develop and maintain multiple, distinct compliance regimes throughout their fields of operation. This patchwork of state and local laws undermines Congress's intent to establish a comprehensive and uniform national framework that limits the imposition of undue burdens on businesses.

Even standing on its own, the Legal Arizona Workers Act imposes significant burdens on businesses that operate in Arizona. It places unique costs on businesses by imposing penalties on certain employers beyond those prescribed by federal law, and by establishing its own adjudication system to determine whether employers have hired unauthorized workers. Those penalties include the forfeiture of a business license, which can be fatal to an employer. The Arizona law also requires employers in the State to use a particular employment verification program, E-Verify, that Congress decided should be voluntary, not mandatory. Although the program continues to evolve, E-Verify remains inaccurate in certain respects and imposes continued burdens on employers. These burdens set E-Verify apart from the standard I-9 system that Congress did choose to

mandate, in part because of the limited burdens and risks it imposed on employers.

ARGUMENT

Over twenty years ago, Congress recognized that the employment of illegal aliens was a national problem requiring a national solution. In response, Congress enacted the Immigration Reform and Control Act of 1986 ("IRCA") to create a uniform and comprehensive national employment verification framework. *See* Pub. L. No. 99-603, 100 Stat. 3359 (codified as amended at 8 U.S.C. §§ 1324a, 1324b). The IRCA, as amended through subsequent statutes, *e.g.*, the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 ("IIRIRA"), Pub. L. No. 104-208, 110 Stat. 3009, establishes a "comprehensive scheme prohibiting the employment of illegal aliens in the United States." *Hoffman Plastic Compounds, Inc. v. NLRB*, 535 U.S. 137, 147 (2002).

Congress fashioned this "comprehensive scheme" in a manner sensitive to several competing considerations. In particular, Congress's sensitivity to the burden on employers pervaded its deliberations. *See Collins Foods Int'l, Inc. v. INS*, 948 F.2d 549, 554 (9th Cir. 1991) ("[T]he legislative history of section 1324a indicates that Congress intended to minimize the burden and the risk placed on the employer in the verification process."). As a result of Congress's concerns for the interests of businesses, it ultimately adopted a framework that is "fair to decent and honest employers, but at the same time, ensure[s] that repeat offenders will be subject to strong civil and criminal penalties." 132 Cong. Rec. H10,584 (daily ed. Oct. 15, 1986) (statement of Rep. Rodino).

The Legal Arizona Workers Act and other analogous state and local laws interfere with Congress's establishment of a comprehensive and uniform employment verification framework. Contrary to Congress's wishes, Arizona's law places substantial costs on businesses by imposing additional sanctions above those permitted under federal law and by mandating use of the E-Verify program—which Congress deliberately specified should be voluntary. The burdens imposed on businesses are magnified many times over by the patchwork of new immigration provisions enacted by states and municipalities in recent years. The competing and inconsistent requirements undermine Congress's intent to establish a uniform and comprehensive framework that would avoid unduly burdening American businesses.

A. IRCA REFLECTS A CAREFUL BALANCING OF INTERESTS, INCLUDING AVOIDING THE IMPOSITION OF AN UNDUE BURDEN ON EMPLOYERS

IRCA was the culmination of a lengthy legislative process. *See* H.R. Rep. No. 99-682, pt. 1, at 52-56 (1986) (discussing the 15-year legislative process resulting in IRCA); S. Rep. No. 99-132, at 18-26 (1985). Upon signing IRCA into law, President Reagan called it "the product of one of the longest and most difficult legislative undertakings in recent memory." Statement of the President Upon Signing S. 1200, Nov. 10, 1986.

1. In the period leading up to IRCA's enactment, Congress encountered substantial concerns about making employer sanctions the cornerstone of immigration reform. A wide range of business and civil

rights organizations initially opposed the imposition of sanctions on employers for hiring unauthorized workers. *See* S. Hrg. 98-198, at 69-70, 296, 368-69; S. Hrg. 99-273, at 60-61, 343. Opponents believed that employer sanctions unfairly imposed the burden on employers for the government's failure to protect the border. *See, e.g.*, 130 Cong. Rec. H5707 (daily ed. June 13, 1984) (statement of Rep. Edwards) (wrong to place "the responsibility for resolving the illegal alien problem on the shoulders of the American employer, rather than on the Federal Government where it belongs"). Opponents also feared that "employer sanctions are an attempt to make immigration officials of all of our Nation's employers, all 5 million of them, a job for which they have no training or expertise and for which they should not have to use their limited resources." *Id.*

The business community expressed concerns that national companies would be punished for transgressions of a single subdivision, and that stiff monetary fines could put many small businesses completely out of business. *See* Testimony of Jerry Jasinowski, on behalf of the National Association of Manufacturers, S. Hrg. 99-273, at 287. Members of Congress acknowledged that there were a limited number of companies and industries known for hiring unauthorized aliens. They thus expressed concern that, instead of targeting these repeat offenders, new legislation might impose substantial burdens in a blanket fashion on all employers. *See* 130 Cong. Rec. H5709 (daily ed. June 13, 1984) (statement of Rep. Schroeder).

Opponents also feared that employer sanctions might cause employers to relocate their business op-

crations abroad, harming American workers and the American economy. *See, e.g.*, 130 Cong. Rec. H5707 (statement of Rep. Edwards) ("This country already faces capital and job flight overseas to other countries. Under employment sanctions, surely this will only increase."); S. Hrg. 99-273, at 44, Testimony of Dr. Barry Chiswick, Hoover Institution ("Employer sanctions are the equivalent of an employment tax" that "may further worsen the job opportunities of low-skilled workers legally in the United States, particularly youths and minorities."). Opponents additionally expressed concerns that employer sanctions could provoke discrimination against US citizens and legal aliens of foreign origin based on perceived national origin:

> The employers of America are going to be placed under undue hardship. They will be watched very carefully. There are people with businesses in Wichita, KS; in New York City; in San Diego, CA, and Portland, ME. They will be scrutinized and asked to fill out forms. They are going to have no understanding of why they are doing this. I would like to tell the employers of America that in their search to make sure that they abide by the law that they please not turn away people who look different or sound different.

130 Cong. Rec. H5713 (statement of Rep. Garcia).

2. Congress sought to address those various concerns in the provisions of IRCA. In particular, Congress intended IRCA to be the "least disruptive to the American businessman . . . [while] also minimiz[ing] the possibility of employment discrimina-

tion." H.R. Rep. No. 99-682, pt. 1, at 56; S. Rep. No. 99-132, at 8-9 (same). Congress accordingly established protections for employers who act in good faith and for small businesses. For example, Congress prescribed an affirmative defense for employers who attempt in good faith to comply with IRCA's document verification requirements. *See* 8 U.S.C. § 1324a(a)(3), (b)(1)(A), (b)(6). Additionally, Congress ensured that employers would not bear responsibility for verifying the authenticity of employment authorization documents: employers are deemed to have complied with the IRCA requirements as long as a document "reasonably appears on its face to be genuine." 8 U.S.C. § 1324a(a)(3), (b)(1); *see* S. Rep. No. 99-132, at 10-12, 32 (1985); H.R. Rep. No. 99-682, pt. 1, at 52-56, 60-62.

Further, Congress carefully calibrated the penalties to be imposed on employers for employing unauthorized workers. 8 U.S.C. § 1324a(e)(4). First-time violators are subject to a monetary fine, penalties increase for second and subsequent violations, and employers engaged a "pattern or practice" of violations are subject to criminal fines and potential imprisonment. *Id.*; *id.* § 1324a(f). Congress further provided that, in determining the amount of a monetary penalty, an administrative law judge shall consider "the size of the business of the employer being charged." *Id.* § 1324a(e)(5). And Congress prescribed that, in cases of large corporations with separate subdivisions, penalties shall be imposed only on "distinct, physically separate subdivisions." *Id.* § 1324a(e)(4)(B). Additionally, Congress required the GAO to prepare a report to determine whether "an unnecessary regulatory burden has been created

for employers," IRCA § 101(j), and established a joint taskforce to review this and other reports and make follow-up recommendations, *id.* § 101(k).

Finally, Congress sought to allay concerns that the enactment of employer sanctions would give rise to discrimination against job applicants based on their perceived nationality. Congress included provisions expressly prohibiting employment discrimination based on national origin or citizenship status. *See* IRCA § 102 (enacting 8 U.S.C. § 1324b). Congress also provided victims of discrimination with the right to file charges, 8 U.S.C. §§ 1324b(b), (d)(2), and established a graduated schedule of penalties on employers for discrimination paralleling the penalties for employing unauthorized workers, *see* IRCA § 102 (enacting 8 U.S.C. § 1324b(g)(2)(B)).

B. THE PATCHWORK OF STATE AND LOCAL LAWS ADDRESSING EMPLOYMENT OF IMMIGRANTS, INCLUDING ARIZONA'S LAW, PLACES SIGNIFICANT BURDENS AND COSTS ON BUSINESS

While the Legal Arizona Workers Act itself imposes significant costs on businesses that operate in the state, Arizona's law is but one example of a growing multitude of similar efforts by states and localities to establish their own rules governing verification of immigrants' employment eligibility. States and cities have modified the federal electronic or document verification requirements, developed their own adjudication and enforcement mechanisms, and imposed their own sanctions and penalties. Each one of these laws imposes concrete burdens on businesses that operate in the jurisdiction. Those bur-

dens are particularly magnified for multi-state business subject to the patchwork of conflicting and costly standards and requirements. The result is to thoroughly undermine Congress's objective in IRCA to establish a uniform, nationwide system that would be "least disruptive to the American businessman." H.R. Rep. No. 99-682, pt. 1, at 56.

1. a. In recent years, state legislatures have enacted a growing deluge of laws regulating various aspects of immigration. The National Conference of State Legislatures ("NCSL") has prepared yearly reports collecting and cataloguing the laws. Those studies demonstrate the quantity and breadth of the new laws. According to the NCSL 2010 Report[2]:

- In 2005, 300 immigration-related bills were introduced and 38 laws were enacted.
- In 2006, activity doubled: 570 bills were introduced and 84 laws were enacted.
- In 2007, activity tripled: 1,562 bills were introduced and 240 laws were enacted.
- In 2008, activity remained at this high level: 1305 bills were considered and 206 were enacted.
- In 2009, more than 1,500 bills were introduced, 222 laws were enacted, and 131 resolutions adopted.

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[2] NCSL Immigrant Policy Project, 2010 Immigration-Related Laws and Resolutions in the States (rev. July 20, 2010), *available at* http://www.ncsl.org/default.aspx?TabId=20881.

- And in the *first half* of 2010 alone, 1,374 bills and resolutions were introduced, and state legislatures passed 191 laws and adopted 128 resolutions. In addition, during this period "every state in regular session considered laws related to immigrants or immigration."

These newly enacted state and local laws cover a number of topics relating to immigration, ranging from law enforcement to identification to education and benefits. But in each of these recent years, laws regulating employment of immigrants number among the most frequently introduced and enacted. *See, e.g.*, NCSL 2008 Report[3] at 1 (stating that "[a]s in recent years, the top three areas of interest are identification/driver's licenses, employment and law enforcement"). Thus, according the NCSL, 244 employer-related immigration bills were introduced in 45 states in 2007, and 20 states enacted legislation. NCSL 2007 Report[4] at 2, 7-10. In 2008, 13 states enacted 19 more employer-related immigration laws. NCSL 2008 Report, *supra*, at 5-8. And in 2009, 12 states enacted 21 employment related laws, and 6 more laws were vetoed. *See* NCSL 2009 Report.[5]

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[3] NCSL Immigrant Policy Project, State Laws Related to Immigrants and Immigration in 2008 (rev. Jan. 27, 2009), *available at* http://www.ncsl.org/Portals/1/documents/immig/StateImmigReportFinal2008.pdf.

[4] NCSL Immigrant Policy Project, 2007 Enacted State Legislation Related to Immigrants and Immigration (rev. Jan. 31, 2008), *available at* http://www.ncsl.org/print/immig/2007Immigrationfinal.pdf.

[5] NCSL Immigrant Policy Project, 2009 State Laws Related to Immigrants and Immigration January 1—December 31,

Those totals do not even include municipal ordinances or state resolutions.

b. This patchwork of immigration employment laws, which impose a variety of requirements inconsistent with those authorized by Congress, defies easy categorization. The different nature of these mandates, as much as their increasing prevalence, imposes just the sort of costly compliance burdens that Congress intended to prevent when it implemented a national system. These include:

* *Requiring certain employers to use E-Verify.* As explained in more detail below, Arizona's law explicitly requires employers to use E-Verify, even though Congress deliberately made the program voluntary. A number of other States and local jurisdictions have enacted provisions that likewise govern employers' use of E-Verify. Mississippi and Utah also explicitly require employers to use the program.[6] Colorado, Minnesota, Missouri, Georgia, Rhode Island, and certain municipalities explicitly or effectively require state contractors to participate in the program.[7]

2009 (rev. Dec. 1, 2009), *available at* http://www.ncsl.org/default.aspx?tabid=19232.

[6] Miss. Code Ann. § 71-11-3; Utah Code Ann. § 13-47-201.

[7] *See* Colo. Rev. Stat. §§ 8-17.5-101(3.3), 8-17.5-102(1), (5)(c)(I)–(III); Minn. Exec. Order 08-01 (Jan. 7, 2008); Mo. Rev. Stat. §§ 285.525(6), 285.530(2); Ga. Code Ann. § 13-10-91(b), R.I. Exec. Order 08-01 (Mar. 27, 2008); S.C. H.B. 4400 §§ 3, 19 (codified at S.C. Code Ann. §§ 41-8-20(B)(1), 8-14-10(A)(4), 8-14-20(B)(1)); Ordinance No. 2006-18 § 4(D) (Hazelton, Pa.); Ordinance No. 2006-005 § 4(D) (Bridgeport, Pa.); Ordinance No. 1736 § 4(D) (Valley Park, Mo.); Resolution No. 2006-R-106 (Cherokee Cnty., Ga.); Ordinance No. 07-02 § 23.D.13 (Dorchester Cnty., S.C.); Ordinance No. 07-260 (Mission Viejo, Cal.).

Virginia will require all of its agencies to use E-Verify beginning in 2010.[8] Other states, such as Oklahoma, require certain employers to use a state-created employment verification system.[9] Illinois, in direct contrast, forbade employers in the state from using E-Verify, *see* 820 Ill. Comp. Stat. 55/12, but a court has held that federal law preempted that ban, *see United States v. Illinois*, No. 07-3261, 2009 WL 662703 (C.D. Ill. Mar. 12, 2009). Relatedly, the California legislature recently passed, and the Governor vetoed, a bill that would have prohibited the use of E-Verify except when required by federal law. *See* Cal. AB 1288 (vetoed Oct. 11, 2009).

* *Overriding the federal I-9 document verification system.* Still other jurisdictions effectively override the federal I-9 document verification system by altering the numbers and types of documents required, or the scope of employees covered. Tennessee and Louisiana regulate the number and types of documents employers can use to verify work authorization status.[10] Georgia and South Carolina impose special tax withholding requirements on employers who fail to collect additional information from employees beyond that required in the federal I-9 employment verification process.[11] South Carolina requires some private businesses who do not use E-Verify to hire only those employees who meet the

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[8] Va. Code Ann. § 40.1-11.2.

[9] Okla. Stat. tit. 25, §§ 1312, 1313(B)(2).

[10] Tenn. Code Ann. § 50-1-106; La. Rev. Stat. Ann. § 23:992.2.

[11] Ga. Code Ann. § 48-7-101(i); S.C. H.B. 4400 § 8 (codified at S.C. Code Ann. § 12-8-595(A)–(B)).

state's driver license eligibility requirements. 2008 S.C. Laws Act 280 (H.B. 4400) § 19 (codified at S.C. Code Ann. § 41-8-20(B)(2)(b)–(c), (C)). And Oklahoma's law effectively requires an employer to verify the employment eligibility of a non-employee independent contractor, Okla. Stat. tit. 68, § 2385.32, even though federal law excludes contractors from the I-9 process, *see* 8 C.F.R. § 274a.1(f)–(g). Hazleton, Pennsylvania likewise attempted to require document verification for independent contractors. *See Lozano v. City of Hazleton*, 496 F. Supp. 2d 477, 526 (M.D. Pa. 2007).

* *Authorizing state officials to adjudicate employer compliance under altered standards.* In addition to imposing document or electronic verification requirements on employers that depart from those prescribed by federal law, certain recently enacted statutes instruct state officials to make their own independent evaluations about an employer's compliance. The challenged Arizona law allows a state judge to determine whether employers have violated the hiring prohibition. Ariz. Rev. Stat. § 23-212(A). Oklahoma subjects employers to the state administrative machinery that attends charges of discrimination. *See* Okla. Stat. tit. 25, § 1313(C). Those types of provisions conflict with the elaborate administrative review system enacted by Congress to determine whether an employer knowingly employed an illegal alien. *See* 8 U.S.C. § 1324a(e)(3); 28 C.F.R. pt. 68. Moreover, whereas the IRCA permits federal sanctions only if an employer "knowingly" hires an unauthorized alien, State and local laws have lowered the scienter requirement, sometimes permitting employers to be held liable based on a standard of

mere "reckless[ness]"[12] or "negligence,"[13] or even strict liability.[14]

* *Imposing additional penalties and sanctions.* A number of states impose a range of additional penalties on employers, beyond those authorized by federal law. Some jurisdictions allow civil and criminal penalties, including fines and even imprisonment, for employers they find to have hired illegal immigrants.[15] Other states have created new types of legal liability for employers through the tort system. Oklahoma, for example, subjects employers to a discrimination claim on behalf of any discharged employee if the employer "reasonably should have known" that a retained employee is an unauthorized alien. Okla. Stat. tit. 25, § 1313(C). Louisiana, Mississippi, South Carolina, Utah, and certain municipalities have created similar tort claims.[16] Arizona,

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[12] Miss. S.B. 2988 § 2(8)(c)(i), Reg. Session (2008).

[13] Utah Code Ann. § 63G-11-103(4)(a)(i).

[14] La. Rev. Stat. Ann. § 23:992; Ordinance No. 2006-18 § 4(A) (Hazelton, Pa.); Ordinance No. 2006-005 § 4(A) (Bridgeport, Pa.); Ordinance No. 07-02 § 23.C (Dorchester Cnty., S.C.). Hazelton amended its ordinance after it was attacked in litigation. Ordinance No. 2007-6 (Hazelton, Pa.); *see Lozano*, 496 F. Supp. 2d at 484-85 & n.2. But strict liability regimes remain in force in Louisiana, Bridgeport, and Dorchester County.

[15] La. Rev. Stat. Ann. § 23:993; W. Va. Code § 21-1B-5; Local Law No. 52-2006 § 8 (Suffolk County, N.Y.).

[16] La. Rev. Stat. Ann. § 23:994; Miss. S.B. 2988 § 2(4)(d); S.C. H.B. 4400 § 12 (codified at S.C. Code Ann. § 41-1-30); Utah Code Ann. § 63G-11-103(4); Ordinance No. 2006-18 § 4(E)(2) (Hazelton, Pa.); Ordinance No. 2006-005 § 4(E)(2) (Bridgeport, Pa.). Still additional jurisdictions threaten either direct or tort liability on businesses not using Basic Pilot. *See* Ga. Code Ann. § 48-7-21.1(b)–(c)(1); Miss. S.B. 2988 § 2(4)(d)–(e); S.C. H.B.

along with other states, including Hawaii, punishes violations through suspension or revocation of a business's "licenses," including withdrawal of its charter.[17] And Colorado, Georgia, Missouri, and South Carolina bar businesses from deducting wages paid to known unauthorized workers as a business expense on state income tax forms.[18]

2. a. The rash of new laws places significant administrative, compliance, and punitive costs on businesses. To begin with, the patchwork of laws causes considerable confusion for employers and employees alike. It is difficult enough for businesses to stay informed of the steady flow of new legal requirements, let alone to develop compliance programs that keep pace with the unpredictable and ever-changing legal landscape.

Moreover, the range of distinct verification regimes in different jurisdictions imposes substantial administrative costs on businesses, particularly on human resources and legal offices. At a minimum, businesses must devote significant resources to monitor, understand, and attempt to comply with these laws. They must hire and train human re-

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4400 §§ 12, 19 (codified at S.C. Code Ann. §§ 12-6-1175(B), (F) (tax), 41-1-30(A), (E) (tort), 41-8-20, -30, -40 (direct)); Utah Code Ann. § 63G-11-103(4)(a)–(b); Ordinance No. 07-02 §§ 23.C, 23.D.5 (Dorchester County, S.C.).

[17] *See* Ariz. Rev. Stat. § 23-212; *see also, e.g.*, Miss. Code Ann. § 71-11-3(7)(e); Mo. Rev. Stat. §§ 285.525, 285.535; W. Va. Code § 21-1B-7; Hawaii H.B. 2897 (enacted June 30, 2010).

[18] Colo. Rev. Stat. § 39-22-529(2); Ga. Code Ann. § 48-7-21.1(b); Mo. Rev. Stat. § 285.535(14); S.C. Code Ann. § 12-6-1175(B).

sources professionals in different jurisdictions. And when businesses are unable to adapt their verification systems to a new law in any given state, they face harsh sanctions and penalties, even if they remain in full compliance with federal law. As one human resources organization testified to Congress, "it is becoming impossible for employers with presence in several states to keep in compliance with the various requirements."[19] Of course, employers all the while must abide by the IRCA and its implementing regulations, in addition to the patchwork of state and local requirements.

Consider, as an example, the burdens that laws like Arizona's place on a company like Walmart. Walmart operates more than 4,300 facilities in the United States, in all 50 states and thousands of cities and towns.[20] In Arizona alone, the company has over 100 stores and 31,000 employees.[21] Walmart prides itself on recruiting a diverse workforce: for instance, over 171,000 Hispanic employees work for the company. The scale of Walmart's human re-

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[19] Statement of the Human Resource Initiative for a Legal Workforce Submitted to the H. Jud. Comm. Subcomm. on Immigration, Citizenship, Refugees, Border Security and International Law at 8 (June 10, 2008), *available at* http://www.legalworkforce.org/sites/default/files/House%20Immigration%20Subcommittee.pdf.

[20] *See* Walmart Corporate Fact Sheet, *available at http://walmartstores.com/pressroom/FactSheets/*. Walmart State-by-state Information, *available at* http://walmartstores.com/pressroom/StateByState/.

[21] *See* Walmart State-by-state Information on Arizona, http://walmartstores.com/pressroom/StateByState/State.aspx?st=AZ.

sources processes is staggering: it received more than 13 million job applications in 2008 alone.[22] Complying with federal law while processing millions of applications and seeking to hire a diverse workforce already poses significant challenges. Compliance becomes exponentially more costly and burdensome when one takes into account the additional conflicting and complex state and local requirements in the various jurisdictions in which Walmart operates. Any business that hires employees in multiple jurisdictions will face similar problems. And even small business that hire employees in just one location will still be forced to comply with both federal and state and local requirements.

b. Because Arizona's law is part of this larger patchwork, the Court should consider this case in the context of the full range of state and local regulations. Permitting Arizona's law to remain standing could encourage other jurisdictions to enact still further employment verification regulations. The cumulative effect of all of those laws places substantial burdens on employers' ability to hire new employees and a diverse workforce. By contrast, because Arizona's law is among the most extreme of the state and local laws, and because many of those laws were enacted only recently—and in some cases have yet to take effect—the Court, by holding Arizona's law preempted, can address the growing group of state and local laws before it becomes even more burdensome.

Indeed, this Court has emphasized the need to maintain that sort of global perspective when con-

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[22] *See* Walmart Diversity Page, http://walmartstores.com/Diversity/299.aspx.

sidering a preemption challenge. In *Rowe v. New Hampshire Motor Transport Ass'n*, 128 S. Ct. 989 (2008), the Court held that Maine's effort to establish rules affecting the shipment of tobacco products in the State was preempted by federal law (the Federal Aviation Administration Authorization Act of 1994). In finding the Maine law preempted, the Court explained that "allow[ing] Maine to insist that the carriers provide a special checking system would allow other States to do the same." 128 S. Ct. at 996. And a decision that "federal law . . . permit[s] these, and similar, state requirements could easily lead to a patchwork of state . . . laws, rules, and regulations." *Id.* In *Rowe*, the Court considered "[t]hat state regulatory patchwork [to be] inconsistent with Congress' major legislative effort." *Id.; see also Buckman Co. v. Plaintiffs' Legal Comm.*, 531 U.S. 341, 350 (2001) (considering the consequences of "50 States' tort regimes"); *Bonito Boats, Inc. v. Thunder Craft Boats, Inc.*, 489 U.S. 141, 161 (1989) (considering the "prospect" of action by "all 50 States").

Here, likewise, the Court should approach this case with the understanding that upholding Arizona's law "could easily lead to a patchwork of state" and local laws. Indeed, that "regulatory patchwork" has already become a reality, one that places significant and growing burdens and penalties on businesses that endeavor in good faith to comply with federal law.

C. THE ARIZONA STATUTE SUBJECTS BUSINESSES TO HARSH PENALTIES AND BURDENSOME REQUIREMENTS

1. The Employer Sanctions Provision Unduly Punishes Businesses

The Arizona statute establishes an independent, state prohibition against hiring unauthorized aliens, which it enforces with penalties that "are far more severe than those authorized under federal law." U.S. Br. in Support of Cert. at 14; *see also* Ariz. Rev. Stat. § 23-212. The statute's sanctions can be highly burdensome—and potentially debilitating—for businesses.

The punitive nature of the sanctions is self-evident and requires no extended elaboration. An employer's first violation of the statue results in the imposition of a mandatory probationary period, during which the business must file quarterly reports for each and every new employee it hires; the state court may also order the suspension, for a ten-day period, of the employer's "licenses"—which the Act defines broadly to include charters, articles of incorporation, and other foundational documents. *Id.* §§ 23-212(F)(1), 23-211(9). The penalty for a second violation is the permanent and immediate revocation of the employer's business licenses at the location where the unauthorized alien worked, or—if the employer has no license specific to that location—at the employer's primary place of business. *Id.* § 23-212(F)(2). The practical effect of that punitive sanction, accurately deemed the "business death penalty" by Arizona's then-governor, Pet. 9, is to end the very existence of some businesses.

2. Arizona's E-Verify Requirement Burdens Businesses With the Expense and Delay of Employment Verification Procedures Distinct From the Federal Requirements

The Arizona law's requirement that "every employer" in the state use E-Verify encumbers employers with additional costs and burdens. *See* Ariz. Rev. Stat. § 23-214(A). Congress created E-Verify (then known as the "Basic Pilot Program") as one of three voluntary and experimental employment verification programs to supplement the standard federal I-9 document verification system. *See* 8 U.S.C. § 1324a note. From the outset, Congress prescribed that employer participation in E-Verify be strictly voluntary. *See* IIRIRA, Pub. L. No. 104-208, 110 Stat. 3009, § 402(a) (1996) ("the Attorney General *may not require* any person or other entity to participate in" E-Verify) (emphasis added); *see also id.* § 402(d)(2), (3)(A) (repeatedly noting the "voluntary nature" of the program). Moreover, as Congress has continued to study E-Verify, it has repeatedly declined to require private employers to use the program. *See, e.g.*, H.R. 98, 110th Cong. § 5(a) (2007); H.R. 1951, 110th Cong. § 3 (2007); *Electronic Employment Verification Systems: Needed Safeguards to Protect Privacy and Prevent Misuse, Hearing Before the Subcomm. on Immigration, Citizenship, Refugees, Border Security, and Int'l Law of the H. Comm. on the Judiciary*, 110th Cong. (June 10, 2008).[23] Congress has

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[23] Certain federal agencies recently promulgated a regulation mandating the use of E-Verify by certain federal contractors and sub-contractors. Federal Acquisition Regulation, 73 Fed. Reg. 67,651 (Nov. 14, 2008) (codified at 48 C.F.R. pts. 2,

kept E-Verify strictly voluntary for good reason: while the program continues to evolve and improve, it imposes significant burdens on employers.

a. Employers who participate in E-Verify must use the Internet to check their employees against a federal database of presumably valid Social Security numbers. *See* Expansion of the Basic Pilot Program, 69 Fed. Reg. 75,997, 75,998 (Dec. 20, 2004); E-Verify Memorandum of Understanding ("MOU"), *available at* http://www.uscis.gov/files/nativedocuments/MOU.pdf. Many employees cannot be immediately confirmed as work-authorized because the information their employer enters into the system fails to match records contained in the federal database. *See Employment Verification—Challenges Exist in Implementing a Mandatory Electronic Employment Verification System: Hearing Before the Subcomm. on Social Security, H. Comm. on Ways & Means*, 110th Cong. 4 (2008) (statement of Richard M. Stana, Government Accountability Office) ("GAO Testimony"). For any employee whom the database—and, in the case of non-citizens, an immigration official—fails to clear, E-Verify provides a "tentative nonconfirmation" of work authorization status. Westat, *Findings of the E-Verify Program Evaluation* xxv (2009), *available at*

22, 52). The rule, however, requires the use of E-Verify only for those private employers who voluntarily choose to contract with the federal government. *See* U.S. Br. in Support of Cert. 18-19 n.10. Nor does the rule authorize states to require E-Verify in any circumstances. To the contrary, the rule's narrow application only underscores that E-Verify is voluntary except where explicitly made mandatory.

http://www.uscis.gov/USCIS/E-Verify/E-Verify/Final%20E-Verify%20Report%2012-16-09_2.pdf.

A recent, government-commissioned study determined that over four percent of E-Verify's results are inaccurate. *Id.* at xxx (reporting a total inaccuracy rate of 4.1 percent). The Social Security Administration ("SSA") has acknowledged that its "Numident" file—one of the databases on which E-Verify relies—contains inaccuracies that could result in the communication of incorrect work authorization information to employers on a substantial scale. *See* Office of the Inspector General, Social Security Administration, *Congressional Response Report: Accuracy of The Social Security Administration's Numident File* ii (2006), *available at* http://www.ssa.gov/oig/ADOBEPDF/A-08-06-26100.pdf. After reviewing a sample of its records, the agency estimated that over four percent of its files—or 17.8 million records—could result in "incorrect feedback" when submitted through E-Verify. *Id.*

The error rate in E-Verify is particularly acute for foreign-born employees. Because the SSA does not automatically update the citizenship status of aliens who become naturalized citizens, as many as 3.3 million non-U.S. citizen records contain out-of-date citizenship status information, a significant problem that has caused the agency itself to express concern about "the extent of incorrect citizenship information" in the Numident file. *See id.* Because E-Verify relies in part on the SSA's database, naturalized, work-authorized citizens with outdated SSA files may erroneously receive a temporary nonconfirmation, potentially requiring them to contact the United States Citizenship and Immigration Service

("USCIS") or travel to an SSA field office to correct their records. *See* GAO Testimony, *supra*, at 13; *see also* Westat, *Findings of the E-Verify Program Evaluation*, *supra*, at 212-13. In the end, foreign-born, work-authorized employees—whether naturalized citizens or work-authorized non-citizens—are more than 20 times more likely to receive an erroneous tentative nonconfirmation than someone born in the United States. *See id.* at xxxv.

E-Verify also produces erroneous results in the converse direction, mistakenly designating unauthorized workers to be authorized. Indeed, the same recent study estimated that E-Verify's inaccuracy rate for unauthorized workers exceeds 50 percent, with more than half of unauthorized workers mistakenly deemed authorized. *Id.* at xxx-xxxi. These false positives give employers little assurance that E-Verify will result in an authorized workforce, and can seriously disrupt employers' operations if employees whom E-Verify erroneously cleared are later discovered to be unauthorized. *See Problems in the Current Employment Verification and Worksite Enforcement System: Hearing Before the H. Subcomm. on Immigration*, 110th Cong. 35-37 (2007) (testimony of John Shandley, Swift & Company) (government raids detained 1,282 employees despite company's longstanding use of E-Verify, disrupting its operations and costing the company more than $30 million).

Additionally, E-Verify's operation can inject uncertainty and delay into employers' investments in hiring and training of new employees. In the case of an employee who receives a tentative nonconfirmation result, E-Verify's rules prohibit taking an ad-

verse action against the employee for eight days in order to allow the employee to contest the result with the federal government. *See* Westat, *Findings of the E-Verify Program Evaluation*, *supra*, at 7. The employer must further suspend action during a subsequent period "while SSA or [DHS] is processing the verification request." MOU at ¶¶ II.C.10. While resolution of the tentative nonconfirmation result remains pending, the employer cannot withhold training from the employee or adjust the employee's assignments. Westat, *Findings of the E-Verify Program Evaluation*, *supra*, at 7.

Even when it operates without flaws, E-Verify exacts a financial toll on businesses, who must acquire, set up, and maintain computer systems, and train personnel in the program. *Id.* at 182-84. Those burdens are particularly pronounced for small businesses, who may lack the means to adequately staff and maintain the program, and who may find themselves at risk of noncompliance and incurring the resulting substantial penalties.

b. The burdens associated with E-Verify stand in contrast to the employment verification system Congress *did* mandate—the standard federal I-9 process—which carefully limits employers' verification responsibilities. Under the paper-based, I-9 system established by IRCA, employers examine specified documents to determine whether a prospective employee is authorized to work in the United States. 8 U.S.C. § 1324a(b). As long as those documents reasonably appear on their face to be genuine, the employer has satisfied its burden; indeed, the employer must accept the documents and cannot ask for addi-

tional or different ones. *See* 8 U.S.C. §§ 1324a(b), 1324b(a)(6).

The costs and burdens attendant to mandatory E-Verify participation are inconsistent with the choice Congress made when it required employers to participate in the I-9 process. Congress's decision to impose a verification system that limits the burden and risk for employers reflects a desire to constrain the employment of illegal aliens in a manner "least disruptive to the American businessman." H.R. Rep. No. 99-682, pt. 1, at 56. When it came to determining what type of employment verification process to impose, Congress accordingly emphasized that "it is not expected that employers ascertain the legitimacy of documents presented during the verification process." *Id.* at 61; *see also Collins Foods Int'l, Inc. v. I.N.S.*, 948 F.2d 549, 554 (9th Cir. 1991) ("Congress did not intend the statute to cause employers to become experts in identifying and examining a prospective employee's authorization documents."). Requiring employers to use E-Verify runs counter to that congressional choice.

It is possible that continued improvements and modifications to E-Verify could ameliorate the burdens it imposes on businesses to an extent warranting its mandatory and widespread use. But that is a judgment for Congress to make, not for each individual state and municipality.

CONCLUSION

The Court should reverse the judgment of the court of appeals.

Respectfully submitted,

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September 8, 2010

AMICUS CURIAE BRIEF

No. 09-115

IN THE
Supreme Court of the United States

CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA, *ET AL.*,

PETITIONERS,

v.

MICHAEL B. WHITING, *ET AL.*,

RESPONDENTS.

On Writ of *Certiorari* to the U.S. Court of Appeals for the Ninth Circuit

BRIEF FOR EAGLE FORUM EDUCATION & LEGAL DEFENSE FUND AS *AMICUS CURIAE* SUPPORTING RESPONDENTS

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QUESTIONS PRESENTED

1. Whether an Arizona statute that imposes sanctions on employers who hire unauthorized aliens is invalid under a federal statute that expressly preempt[s] any State or local law imposing civil or criminal sanctions (other than through licensing and similar laws) upon those who employ, or recruit or refer for a fee for employment, unauthorized aliens. 8 U.S.C. §1324a(h)(2).

2. Whether the Arizona statute is impliedly preempted because it undermines the comprehensive scheme that Congress created to regulate the employment of aliens. *Hoffman Plastic Compounds, Inc. v. NLRB*, 535 U.S. 137, 147 (2002).

3. Whether the Arizona statute, which requires all employers to participate in a federal electronic employment verification system, is preempted by a federal law that specifically makes that system voluntary. 8 U.S.C. §1324a note.

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Legislative History

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48 C.F.R. §22.1802 4
Unfair Immigration-Related Employment Practices, 52 Fed. Reg. 9274 (1987) 14-15
Unfair Immigration-Related Employment Practices, 52 Fed. Reg. 37,402 (1987) 15

Other Authorities

Michael E. Braun, Director & J. Cavenee Smith, Council Attorney, Arizona Legislative Council, Arizona Legislative Bill Drafting Manual, §4.21 (2009) 23

No. 09-115

In The Supreme Court of the United States

CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA, *ET AL.*,

PETITIONERS,

v.

MICHAEL B. WHITING, *ET AL.*,

RESPONDENTS.

On Writ of *Certiorari* to the U.S. Court of Appeals for the Ninth Circuit

INTEREST OF *AMICUS CURIAE*[1]

Amicus curiae Eagle Forum Education & Legal Defense Fund ("Eagle Forum ELDF") is a nonprofit organization founded in 1981. From its inception, Eagle Forum ELDF has defended American sovereignty and promoted adherence to

[1] This *amicus* brief is filed with written consent of all parties; the written letters of consent from petitioners and respondents have been lodged with the Clerk of the Court. Pursuant to Rule 37.6, counsel for *amicus curiae* authored this brief and no counsel for a party authored this brief in whole or in part, nor did any person or entity other than *amicus*, its members, and its counsel make a monetary contribution to the preparation or submission of this brief.

the U.S. Constitution; repeatedly opposed unlawful behavior, including illegal entry into and residence in the United States; consistently stood in favor of enforcing immigration laws and allowing state and local government to take steps to avoid the harms caused by illegal aliens; and defended federalism, including the ability of state and local government to protect their communities and to maintain order. For these reasons, Eagle Forum ELDF has a direct and vital interest in the issues before this Court.

LEGAL AND FACTUAL BACKGROUND

The Chamber of Commerce ("Chamber") and Hispanic groups and individuals (collectively, "Plaintiffs") bring this facial challenge to the Legal Arizona Workers Act, ARIZ. REV. STAT. §§23-211 to -216 ("LAWA"). Under the circumstances, the only relevant "facts" are LAWA's text and the corresponding provisions of federal law that Plaintiffs claim preempts LAWA.

The Immigration Reform & Control Act of 1986 ("IRCA") provides federal civil and criminal procedures and sanctions for employing or recruiting "unauthorized aliens" and expressly preempts state and local sanctions for those activities "other than through licensing and similar laws." 8 U.S.C. §1324a(h)(2). Its legislative history states that:

> [IRCA was] not intended to preempt or prevent lawful state or local processes concerning the suspension, revocation or refusal to reissue a license to any person who has been found to have violated the sanctions provisions in this legislation ... [or] licensing or "fitness to do business laws," such as state farm labor contractor laws or forestry laws,

> which specifically require such licensee or contractor to refrain from hiring, recruiting or referring undocumented aliens.

H.R. REP. NO. 99-682(I), at 58, *reprinted in* 1986 U.S.C.C.A.N. 5649, 5662. Thus, both IRCA's plain language and legislative history preserve state and local authority over licensing and similar laws, including "fitness to do business" laws.

"Numerous witnesses ... expressed their deep concern that the imposition of employer sanctions" would make employers "extremely reluctant to hire persons because of their linguistic or physical characteristics." H.R. REP. NO. 99-682(I), at 68, *reprinted in* 1986 U.S.C.C.A.N., at 5672. Although "[t]he [House Judiciary] Committee d[id] not share the view that wholesale employment discrimination will necessarily result from the enactment of sanctions," "the Committee d[id] believe that every effort must be taken to minimize the potentiality of discrimination and that a mechanism to remedy any discrimination that does occur must be a part of this legislation." *Id.* Accordingly, in addition to providing sanctions for employing "unauthorized aliens," IRCA also made it "an unfair immigration-related employment practice ... to discriminate against any individual (other than an unauthorized alien...) with respect to the hiring ... of the individual for employment or the discharging of the individual from employment ... because of such individual's national origin, or ... [in some circumstances] because of such individual's citizenship status." 8 U.S.C. §1324b(a)(1).

The federal E-Verify program originated as one of the pilot programs on "employment eligibility confirmation" that the Illegal Immigration Reform &

Immigrant Responsibility Act of 1996 ("IIRIRA"), PUB. L. NO. 104-208, Div. C, §401(a), 110 Stat. 3009-546, -655, directed the responsible federal agency (then the Department of Justice, now the Department of Homeland Security) to implement. Although originally only a temporary program for a limited number of states, *Id.*, §401(b)-(c), 110 Stat. 3009-655-56, Congress consistently extended and expanded the E-Verify program. *See, e.g.*, Department of Homeland Security Appropriations Act, PUB. L. NO. 111-83, §547, 123 Stat 2142, 2177 (2009) (extending E-Verify through 2012); Basic Pilot Program Extension & Expansion Act of 2003, PUB. L. NO. 108-156, 117 Stat. 1944 (2003) (making E-Verify available in all fifty States). Employers who use E-Verify establish a rebuttable presumption that they have not violated IRCA. IIRIRA §402(b)(1), 110 Stat. 3009-656-57. Although it mandates E-Verify for federal agencies, their contractors, and certain IRCA violators, IIRIRA §402(e), 110 Stat. 3009-658; 48 C.F.R. §§22.1800-.1802, federal law does not mandate E-Verify for other employers.

Plaintiffs challenge two components of LAWA: (1) a licensing sanction that applies to employers found to have knowingly employed unauthorized aliens, ARIZ. REV. STAT. §§23-212-.212.01, and (2) a mandate that employers use the E-Verify program or its successors to verify employees' employment eligibility, *id.*, §§23-211(5), -214. In enforcing the licensing sanction, state officers must obtain a federal determination of an alien's work authorization under 8 U.S.C. §1373(c), without making their own final determination. ARIZ. REV. STAT. §§23-212(B), -212.01(B). The licensing sanction applies less stringently to first-time violations

(suspension of licenses) than second violations (permanent revocation of licenses). *Compare id.*, §23-212(F)(1)(c) *with id.*, §23-212(F)(2). With certain exceptions, LAWA defines licenses as "any agency permit, certificate, approval, registration, charter or similar form of authorization that is required by law and that is issued by any agency for the purposes of operating a business in this state," *Id.*, §23-211(9)(a), including articles of incorporation and certificates of partnership. *Id.*, §23-211(9)(b)(i)-(ii).

SUMMARY OF ARGUMENT

Although the "[p]ower to regulate immigration is unquestionably exclusively a federal power," *DeCanas v. Bica*, 424 U.S. 351, 354 (1976), this Court has never held that every "state enactment which in any way deals with aliens" constitutes "a regulation of immigration and thus [is] *per se* pre-empted by this constitutional power, whether latent or exercised." *Id.* at 355 (mere "fact that aliens are the subject of a state statute does not render it a regulation of immigration"). Instead, preemption hinges on what the state or local statute does and how it fits within the federal regulation of immigration. Here, neither federal immigration law nor the Constitution preempts Arizona's licensing sanction or its E-Verify mandate.

Plaintiffs lack standing to challenge LAWA's licensing sanction because neither any Plaintiff nor any identified member of a Plaintiff organization faces a sufficiently imminent injury to meet Article III's case-or-controversy requirement (Section I). By contrast, it appears that LAWA's E-Verify mandate imposes sufficient implementation costs on all affected Arizona companies for a membership

organization such as the Chamber to have standing without needing to identify a specific member.

Far from expressly preempting LAWA's licensing sanction, IRCA expressly saves state and local authority over sanctions imposed through licensing and similar laws (Section II). The disconnect that Plaintiffs allege between LAWA's licensing sanction and IRCA's savings clause cannot bridge the presumption against preemption (Section II.B) for issues, such as this, that states lawfully occupied before IRCA (Section II.D). Moreover, because IRCA's anti-discrimination provisions prohibit only intentional discrimination and LAWA operates based on illegal immigration status (not on nationality or lawful immigration status), Arizona has not violated either IRCA or the Equal Protection Clause (Section II.C).

Nor do IRCA's balancing of federal interests or a need for nationwide uniformity impliedly preempt state licensing sanctions (Section III). Because employers can comply with both IRCA and LAWA, Plaintiffs necessarily proceed under this Court's preemption jurisprudence that applies to state or local actions that frustrate or prevent federal objectives, which should require field preemption before a federal interest can trump an otherwise valid exercise of state or local authority. Any lesser standard will find federal preemption in spheres where Congress did not intend it.

Finally, IRCA does not impliedly preempt the LAWA E-Verify mandate because the voluntary federal E-Verify program nowhere evidences any congressional intent to mandate that E-Verify remain voluntary outside the federal system (Section

IV). The federal program's voluntary elements simply do not speak to preempting the states.

ARGUMENT

I. PLAINTIFFS LACK STANDING TO CHALLENGE THE LICENSING SANCTION AND DISCRIMINATION

Article III limits federal courts to "cases" and "controversies," U.S. CONST. art. III, §2, which must be actual or imminent. *Lujan v. Defenders of Wildlife,* 504 U.S. 555, 560 (1992). Constitutional standing presents a tripartite test: cognizable injury to the plaintiffs, caused by the defendants, and redressable by a court. *Defenders of Wildlife,* 504 U.S. at 561-62. Because it goes to the Article III "power of the court to entertain the suit," standing "is the threshold question in every federal case." *Warth v. Seldin,* 422 U.S. 490, 499 (1975). Moreover, plaintiffs bear the burden of establishing their standing, and federal courts "presume that [they] lack jurisdiction unless the contrary appears affirmatively from the record." *Renne v. Geary,* 501 U.S. 312, 316 (1991). Membership associations have standing on the merits to litigate their members' injuries if an identified member (or an entire industry) has standing, the interest protected is germane to the membership organization, and nothing requires the member's participation as a party. *Hunt v. Washington State Apple Advertising Commission,* 432 U.S. 333 (1977); *Summers v. Earth Island Institute,* 129 S.Ct. 1142, 1150-52 (2009).

To challenge both LAWA's licensing sanction and its E-Verify mandate, Plaintiffs must establish standing separately against each: "standing is not dispensed in gross." *Lewis v. Casey,* 518 U.S. 343,

358 n.6 (1996). Finally, although they do not brief standing, the parties cannot confer jurisdiction by consent or waiver. *Insurance Corp. of Ireland v. Compagnie des Bauxites de Guinee,* 456 U.S. 694, 702 (1982). Under the standing doctrine, the Chamber apparently has standing to challenge the E-Verify mandate, but no Plaintiff has standing to challenge LAWA's licensing sanction or any purported discrimination.

In order to bring this facial, pre-enforcement challenge to LAWA's licensing sanction, an employer (*i.e.*, one of the Chamber's members) must have a "credible threat" of facing an enforcement action. *Babbitt v. United Farm Workers Nat'l Union,* 442 U.S. 289, 298 (1979). Moreover, to obtain relief on the merits – as distinct from merely surviving a motion to dismiss – a membership organization must identify at least one actual member with an actual, imminent injury. *Summers,* 129 S.Ct. at 1150.[2] As to the Plaintiffs that represent potential employees injured by LAWA, there are two types of potential injuries: (1) work-authorized aliens or citizens whom the immigration system will incorrectly identify as non-work-authorized, and (2) anyone – particularly those who seem "foreign" – who might not receive an offer of employment from over-cautious employers. The first group is small, and its injury is either too

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[2] A plaintiff can assert the rights of absent third parties only if the plaintiff has standing in its own right, the plaintiff and the absent third parties have a "close" relationship, and a sufficient "hindrance" keeps the third parties from protecting their own interests. *Kowalski v. Tesmer,* 543 U.S. 125, 128-30 (2004) (*citing Powers v. Ohio,* 499 U.S. 400, 411 (1991)).

speculative or too ephemeral to sustain this litigation. The second group represents the people that §1324b protects from discrimination.

With respect to work-authorized aliens or citizens that inaccurate data someday will deny employment, the injury is too speculative. Moreover, even if Plaintiffs had identified the necessary member with this injury, *Summers*, 129 S.Ct. at 1150, knowledge of the error in the federal databases would suffice to avoid any real LAWA-induced injury. That person could simply work with the federal government to correct the error at its source.

With respect to such alleged discrimination, it remains entirely speculative whether any particular work-authorized alien or citizen will suffer discrimination because a prospective employer considers them too foreign-seeming to risk making an offer of employment. *Babbitt*, 442 U.S. at 298 (standing requires "credible threat"). Moreover, the Chamber lacks associational standing to challenge discrimination *by its own members*. *Pennsylvania v. New Jersey*, 426 U.S. 660, 664 (1976) (no standing for "self-inflicted" injuries). If such discrimination occurs, the member – not Arizona – causes it.

Of course, if LAWA *compelled* the Chamber's member companies to discriminate on the basis of national origin, the Chamber would have associational standing to challenge LAWA as discriminatory. *Truax v. Raich*, 239 U.S. 33, 36-38 (1915) ("If [employment] could be refused solely upon the ground of race or nationality, the prohibition of the denial to any person of the equal protection of

the laws would be a barren form of words");[3] *Lutheran Church-Missouri Synod v. FCC*, 141 F.3d 344, 350 (D.C. Cir. 1998) ("[w]hen the law makes a litigant an involuntary participant in a discriminatory scheme, the litigant may attack that scheme by raising a third party's constitutional rights"). But LAWA does not *compel* employers to discriminate. LAWA merely requires employees to confirm an employee's authorization to work.

Alleged discrimination aside, the E-Verify mandate nonetheless imposes training and implementation costs on the Chamber's Arizona member companies. Although "a corporation ... has no racial identity and cannot be the direct target of the petitioners' alleged discrimination" that corporation nonetheless can have "standing to assert its own rights," and "[f]oremost among them is [the] right to be free of arbitrary or irrational [government] actions." *Village of Arlington Heights v. Metro. Housing Dev. Corp.*, 429 U.S. 252, 263 (1977). The Chamber could have associational standing to challenge government action that imposes unnecessary costs on its members. Moreover, because the E-Verify mandate imposes costs on *all* regulated entities, the Chamber need not identify a particular member. *Summers*, 129 S.Ct. at 1150. It appears, therefore, that the Chamber could have standing to challenge LAWA's E-Verify mandate. If

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[3] One of this Court's earliest indirect-injury cases, *Truax*, involved an Austrian national's standing to challenge an Arizona law under which his employer would dismiss him solely to meet the Arizona law's quota on the percentage of aliens in the *employer's* workforce. *Id.*

so, this Court would review the issue without any heightened scrutiny that otherwise might attach to the discrimination issues that Plaintiffs and their *amici* raise.

II. FEDERAL LAW DOES NOT EXPRESSLY PREEMPT THE LICENSING SANCTION

Because LAWA's licensing sanction is not discriminatory and is consistent with both this Court's pre-IRCA decisions and IRCA's savings clause for "licensing and similar laws," Plaintiffs could not succeed in this facial challenge, even without the presumption against preemption. But this Court cannot presume that Congress would restrict existing state and local authority in areas – such as employment and business licensing – without making that intent plain. For all these reasons, IRCA does not expressly preempt LAWA.

A. Plaintiffs' Facial Challenge Does Not Meet the *Salerno* Test

The panel held – and Plaintiffs do not dispute – that Plaintiffs bring a facial challenge to LAWA. Under *U.S. v. Salerno*, 481 U.S. 739, 745 (1987), a "facial challenge to a legislative Act is, of course, the most difficult challenge to mount successfully, since the challenger must establish that no set of circumstances exists under which the Act would be valid." Moreover, "[t]he fact that [a statute] might operate unconstitutionally under some conceivable set of circumstances is insufficient to render it wholly invalid." *Id.; Village of Hoffman Estates* v. *Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 494 n.5 (1982). Although *Salerno* requires facial challenges to meet a high burden of proof, Plaintiffs do not even acknowledge the issue.

As this Court recently emphasized, facial invalidation is counter to the judicial preference not to "nullify more of a legislature's work than is necessary." *Ayotte v. Planned Parenthood*, 546 U.S. 320, 329 (2006). Facial challenges also interfere with the norm of statutory construction that enables avoidance of constitutional questions based on how narrowly a law is applied. *Broadrick v. Oklahoma*, 413 U.S. 601, 613 (1973); *cf. New York v. Ferber*, 458 U.S. 747, 767 (1982). Because LAWA is within Arizona's police power and non-discriminatory, plaintiffs cannot satisfy the *Salerno* standard here.

B. The Presumption against Preemption Applies to LAWA

Courts apply a presumption against preemption for fields traditionally occupied by state and local government. *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947). When this "presumption against preemption" applies, courts will not assume preemption "unless that was the *clear and manifest purpose* of Congress." *Id.* (emphasis added). Even if a court finds that Congress expressly preempted *some* state action, the presumption against preemption applies to determining the *scope* of that preemption. *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 485 (1996). Thus, "[w]hen the text of an express pre-emption clause is susceptible of more than one plausible reading, courts ordinarily 'accept the reading that disfavors pre-emption.'" *Altria Group, Inc. v. Good*, 129 S.Ct. 538, 540 (2008) (*quoting Bates v. Dow Agrosciences LLC*, 544 U.S. 431, 449 (2005)).

Courts "rely on the presumption because respect for the States as independent sovereigns in our federal system leads [them] to assume that

Congress does not cavalierly pre-empt [state law]." *Wyeth v. Levine,* 129 S. Ct. 1187, 1195 n.3 (2009) (internal quotations omitted). For that reason, "[t]he presumption ... accounts for the historic presence of state law but does not rely on the absence of federal regulation." *Id.* If states occupied the field historically, the presumption plainly applies.

Here, state and local government traditionally have occupied the field of business licensing and similar laws, this Court unanimously affirmed that exercise of the police power in *DeCanas* (notwithstanding the nexus with immigration law), and Congress expressly saved that exercise of the police power in IRCA. Given the savings clause for "licensing and similar laws," Congress did not expressly intend to preempt *any* such laws. But – even if Congress had some unexplained intent – the scope of the non-preempted "licensing and similar laws" bears a broad meaning because Congress expansively saved not only licensing laws but also all *similar* laws. Under the circumstances, Plaintiffs cannot cite "clear and manifest" congressional intent to displace states' historic police power over business licensing and employment.

C. LAWA Does Not Discriminate

Echoed by their *amici,* Plaintiffs argue that LAWA is discriminatory and, as such, conflicts with IRCA. *See* Pet. Br. at 60-62 (conflict preemption for LAWA's licensing sanction), 66 & n.27 (conflict preemption for LAWA's E-Verify mandate). Because IRCA's anti-discrimination provisions continue to apply, alongside LAWA, there is absolutely no conflict between LAWA and federal law. *Amicus* Eagle Forum ELDF respectfully submits that Plaintiffs and their *amici* misstate the

discrimination issue in this litigation. The question is not whether IRCA's anti-discrimination provisions impliedly preempt Arizona law, but whether the Fourteenth Amendment's Equal Protection Clause expressly preempts Arizona law. Arizona has not intentionally discriminated on the basis of national origin (or any other protected classification), so it has not discriminated against anyone.

Congress included the anti-discrimination provisions in IRCA because "Congress feared that employers, seeking to avert any possibility of sanctions being imposed on them, would simply refuse to hire 'foreign looking' or 'foreign sounding' persons." Unfair Immigration-Related Employment Practices, 52 Fed. Reg. 9274, 9275 (Mar. 23, 1987) (*citing* H.R. REP. NO. 99-1000, 99th Cong., 2d Sess. 87 (1986), H.R. REP. NO. 99-682, 99th Cong., 2d Sess., pt. 1, at 68 (1986)). As the United States explains, these anti-discrimination provisions "ensure that employers do not engage in racial, ethnic, or other invidious discrimination against legal immigrants and other minorities." U.S. Br. at 2. Arizona lacks the authority to shield Arizona employers from §1324b, and (in any event) Arizona has not taken any steps to *require* Arizona employers to discriminate on the basis of national origin or any other protected classifications.

Indeed, §1324b does not even apply to Arizona acting as an independent sovereign under its police power to regulate employment in Arizona. But even if it did apply, §1324b is no broader than the intentional-discrimination standards of the Equal Protection Clause. Citing only provisions of Title VII of the Civil Rights Act of 1964 and two cases decided under Title VII, Plaintiffs' *amici* argue that "[t]he

federal prohibition on race- or national origin-based discrimination extends beyond practices that are motivated by animus against members of racial minorities or particular nationalities to reach practices that have a disparate impact on such individuals." Asian Am. Justice Ctr. *et al.* Br., at 11. However true that may be of Title VII, it is not true here:

> [IRCA] does not contain an analogue to paragraph (2) of section 703(a) of title VII, which has generally been the foundation of the prohibition against certain forms of unintentional discrimination merely on the basis of their disparate impact.

52 Fed. Reg. at 9275 (proposed rule). Instead, "the statute prohibits intentional discrimination rather than neutral conduct with an unintended disparate impact." Unfair Immigration-Related Employment Practices, 52 Fed. Reg. 37,402, 37,403 (Oct. 6, 1987) (final rule); 28 C.F.R. §44.200(a) (limiting IRCA liability to those who "knowingly and *intentionally* discriminate or ... engage in a pattern or practice of knowing and *intentional* discrimination") (emphasis added); *Rivera v. NIBCO, Inc.*, 364 F.3d 1057, 1073-74 (9th Cir. 2004) ("plaintiff [required to] prove that the employer had a discriminatory intent"). Whether it applies or not, §1324b prohibits only intentional discrimination.[4]

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[4] IRCA supplements Title VII by including a claim for discrimination on the basis of citizenship (which Title VII does not address), as distinct from discrimination on the basis of national origin (which Title VII does address). *Anderson v. Conboy*, 156 F.3d 167, 180 (2d Cir. 1998) ("citizenship

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The Fourteenth Amendment – not IRCA – prohibits Arizona's discriminating on the basis of race or national origin. This familiar standard applies to action taken "at least in part *because of*, not merely *in spite of*, its adverse effects" on a protected class. *Pers. Adm'r v. Feeney*, 442 U.S. 256, 279 (1979) (emphasis added); *Plyler v. Doe*, 457 U.S. 202, 223 (1982) ("[u]ndocumented aliens cannot be treated as a suspect class because their presence in this country in violation of federal law is not a 'constitutional irrelevancy'"). Targeted against those popularly known as "illegal aliens," LAWA "discriminates" based on illegality, not on race or national origin.

Echoed by their *amici*, Plaintiffs cite recent non-record evidence that "foreign-born, work-authorized individuals were 20 times more likely to receive an erroneous tentative nonconfirmation than U.S.-born individuals." Pet. Br. at 49 n.27; Business Organizations Br. at 25. Assuming *arguendo* that these data are accurate, they also are irrelevant. In *Feeney*, the passed-over female civil servant alleged that Massachusetts' veteran-preference law for civil-service promotions and hiring constituted gender discrimination. Although women then represented less than two percent of veterans, *Feeney*, 442 U.S. at

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discrimination is not covered by Title VII"). Of course, someone alleging discrimination on the basis of national origin can bring a Title VII claim. *Id.*; *U.S. v. Todd Corp.*, 900 F.2d 164, 168 (9th Cir. 1990). Indeed, cognizant of the partial overlap, Congress drafted IRCA to exempt national-origin discrimination covered by Title VII. 8 U.S.C. §1324b(a)(2)(B).

270 n.21, Massachusetts did not discriminate *because of gender* when it acted because of another, permissible criterion (veteran status). *Id.* at 272. With women then constituting two percent of all veterans, men were *fifty times* more likely (50:1) to benefit from the state law challenged in *Feeney*. Under the circumstances, Plaintiffs' much lower alleged 20:1 disparity is a constitutional irrelevance. Like Massachusetts, Arizona acted *because of* permissible criteria, which is not discrimination.

Where, as here, a state or local law does not "discriminate[] against aliens *lawfully admitted* to this country," it is constitutional. *DeCanas*, 424 U.S. at 358 n.6 (emphasis added); *INS v. Nat'l Ctr. for Immigrants' Rights*, Inc., 502 U.S. 183, 196 n.11 (1991). Consistent with *DeCanas*, *Feeney*, and *Plyler*, LAWA readily meets constitutional scrutiny under the Equal Protection Clause. Neither the Constitution nor any federal statute prohibits "discrimination" against illegality.

D. IRCA Does Not Facially Preempt the Licensing Sanction

Where illegal immigration intersects with local employment and business licensing, the states have had (and continue to have) a role in enforcing both state and federal law. The seminal precedent is this Court's unanimous *DeCanas* decision, which upheld a state law penalizing the employment of illegal aliens. Our system of dual sovereignties provides ample room for federal, state, and local government to address the various impacts of illegal aliens. Indeed, *DeCanas* upheld the state law because "it focuses directly upon these *essentially local problems* and is tailored to combat effectively the perceived evils." *DeCanas*, 424 U.S. at 357

(emphasis added). Nothing in IRCA or any other law in any way limits that authority or suggests that illegal entry and residency are to be protected, respected, or tolerated.

1. The Licensing Sanction Falls within Arizona's Police Power

Prior to IRCA's enactment, Arizona "possess[ed] broad authority under [its] police powers to regulate the employment relationship to protect workers within [Arizona]." *DeCanas*, 424 U.S. at 356. Similarly, prior to IRCA, federal law did not limit that "broad authority."

> [Courts] will not presume that Congress, in enacting [federal immigration law], intended to oust state authority to regulate the employment relationship ... in a manner consistent with pertinent federal laws. Only a demonstration that complete ouster of state power including state power to promulgate laws not in conflict with federal laws was the clear and manifest purpose of Congress would justify that conclusion.

DeCanas, 424 U.S. at 357 (interior quotations and citations omitted). Far from finding congressional intent to preempt state regulation of alien employment practices, *DeCanas* "rejected the pre-emption claim ... because Congress *intended* that the States be allowed, to the extent consistent with federal law, [to] regulate the employment of illegal aliens." *Toll v. Moreno*, 458 U.S. 1, 13 n.18 (1982) (citing *DeCanas*, 424 U.S. at 361) (interior quotations omitted, emphasis and second alteration in original). Thus, prior to IRCA's enactment, it is indisputable that Arizona's police power included the authority to

adopt LAWA and to regulate the business licenses of entities within Arizona.

Moreover, "broad authority" to combat illegality is central to the "police power." *Jacobson v. Massachusetts,* 197 U.S. 11, 27 (1905) (under "principle of self-defense, ... a community has the right to protect itself"). Indeed, suppressing crime "has always been the prime object of the States' police power." *U.S. v. Morrison,* 529 U.S. 598, 615 (2000); *Slaughter-House Cases*, 83 U.S. (16 Wall.) 36, 62 (1873) (police power extends "to the protection of the lives, limbs, health, comfort, and quiet of all persons") (interior quotations omitted). Plaintiffs' view would deny Arizona the "right to protect itself" from unlawful employment and its accompanying effects. The lawlessness that follows is predictable and, if Arizona has the "right to protect itself," entirely preventable.

For purposes of express preemption, Plaintiffs must concede that IRCA saves state and local authority to sanction the employment of illegal aliens through "licensing and similar laws." *See* 8 U.S.C. §1324a(h)(2). While Plaintiffs do not dispute that IRCA retained that state and local authority, they do dispute whether LAWA's licensing sanction qualifies as a "licensing or similar law" and, even if so, whether LAWA goes too far by suspending articles of incorporation. Pet. Br. at 34-36. The first argument is addressed in Section II.D.2, *infra,* and the second in Section II.D.3, *infra.* Both arguments lack merit.

2. IRCA Does Not Displace the States' Police Power

The prior sections establish that Arizona had police-power authority to regulate employment of illegal aliens prior to IRCA's enactment in 1986, and that LAWA falls squarely within that police power. To complete the analysis, IRCA emphatically *did not* displace that police power.

At the outset, §1324a(h)(2)'s plain language saves state and local authority for licensing and similar laws, an area that state and local government historically has occupied. Thus, while §1324a(h)(2) plainly establishes express preemption, it equally plainly saves the state and local authority recognized in *DeCanas*. Given the express statutory language and the presumption against preemption even when interpreting express preemption, §1324a(h)(2) clearly does not preempt LAWA. *Exxon Mobil Corp. v. Allapattah Servs., Inc.*, 545 U.S. 546, 568 (2005) ("the authoritative statement is the statutory text, not the legislative history"); *Medtronic*, 518 U.S. at 485 (presumption against preemption applies to determining statute's preemptive scope). This Court can begin and end its inquiry with §1324a(h)(2)'s plain language.

Should the Court analyze the legislative history, however, the available history does not alter the outcome. The House report expressly enumerates certain preempted actions (namely, civil and criminal sanctions for employment and recruitment) while also enumerating non-preempted actions (namely, denying licenses to those found to have violated immigration laws and "fitness to do business laws"). H.R. REP. NO. 99-682(I), at 58, *reprinted in* 1986 U.S.C.C.A.N. at 5662. Although the House

report does not expressly authorize enforcement of a state or local ordinance prior to federal enforcement of immigration laws, the House report does not expressly preempt that either. *Id.* Given the presumption against preemption, even in interpreting expressly preemptive statutes, *Medtronic, supra,* the House report does not provide a "clear and manifest" congressional intent to preempt that which *DeCanas* allowed. *Chem. Mfrs. Ass'n v. NRDC,* 470 U.S. 116, 128 (1985) (Congress would not "ignore the thrust of an important decision" *sub silentio*). In short, nothing suggests that Congress ever intended to preempt state and local actions like LAWA.

Assuming *arguendo* that IRCA saved only "licensing laws" and not "similar laws," Plaintiffs would have a weak but at least colorable argument. In essence, Plaintiffs make the somewhat-technical point that Arizona does not issue licenses under LAWA, so LAWA is not a "licensing law." Pet. Br. at 34-35. But LAWA plainly supplements all Arizona licensing laws with a uniform rule that applies equally to all such laws. Numerous federal statutes provide such uniform rules of practice, without delving into substantive issues of any particular sphere. For example, without issuing any particular license, the Administrative Procedure Act provides the rules of practice for federal licenses. 5 U.S.C. §§554-558. Similarly, without dispensing any federal funds, Title VI of the Civil Rights Act of 1964 is "Spending Clause legislation," *Guardians Ass'n v. Civil Service Comm'n of City of New York,* 463 U.S. 582, 599 (1983), because it sets the rules of practice with respect to racial discrimination by recipients of federal funds.

The alternative – namely, for Arizona to have scattered identical mini-LAWAs throughout the Arizona Code – would not have been very sensible. Instead, Arizona sensibly consolidated the uniform rules of practice in a single chapter that applies across the board, notwithstanding the general provisions of any particular licensing law. Again assuming *arguendo* that IRCA saved only "licensing laws" and not "similar laws," a plaintiff could argue unsuccessfully but at least colorably that such a licensing meta-law does not qualify as a "licensing law." Given that IRCA saves not only "licensing laws" but also "similar laws," 8 U.S.C. §1324a(h)(2), Plaintiffs' argument is specious. Even if not itself a "licensing law," LAWA is "similar" enough, even without the presumption against preemption.

3. IRCA Saves Authority beyond Qualification-Based Licenses

At least for the Chamber members organized as corporations under Arizona law, the biggest complaint against the licensing sanction is that it extends beyond qualification-based licenses and licenses to conduct business to include articles of incorporation. Pet. Br. at 35 (describing this as the "business death penalty"). Insofar as "[c]orporations are creatures of state law," *Santa Fe Industries, Inc. v. Green,* 430 U.S. 462, 479 (1977), the question for this Court is not whether this so-called "business death penalty" is unwise or whether the LAWA procedures for applying the business death penalty are unfair. The only question is whether, given the presumption against preemption (Section II.B, *supra*) and the availability of this type of state action before IRCA (Section II.D.1, *supra*), the licensing sanction's extending to articles of incorporation falls

within IRCA's allowance for state sanctions under "licensing and *similar* laws."

Plaintiffs cite Arizona Legislative Bill Drafting Manual, §4.21 (2009) for the proposition that "'licensing' ... mean[s] fitness to do business." Pet. Br. at 28. By its terms, the cited authority defines "the three separate categories of authorization that distinguish the regulation of occupations," which are licensing, certification, and registration. *See* Michael E. Braun, Director & J. Cavenee Smith, Council Attorney, Arizona Legislative Council, Arizona Legislative Bill Drafting Manual, at 50-51 §4.21 (2009).[5] Assuming *arguendo* that this manual could bind Arizona, without bicameralism and presentment, initiative, or referendum, ARIZ. CONST. art. IV, Pt. 1 §1, Pt. 2 §12, two issues bear emphasis. First, by its terms, the section addresses only "the regulation of occupations," *id.*, so it is not surprising that the licensing definition relates only to occupational licensing. Second, the inclusion of the two additional terms – namely, certification[6] and registration[7] – are very similar, in the occupational-licensing context, to articles of incorporation filed

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[5] Available at http://www.azleg.gov/alisPDFs/council/2010-%20Bill%20Drafting%20Manual.pdf (last visited Oct. 28, 2010).

[6] "Certification is a form of regulation that grants recognition to persons who have met predetermined qualifications. Only those who meet the qualifications may legally use the designated title." *Id.* (emphasis in original).

[7] "Registration is the least restrictive alternative form of regulation. Registration requires that a person file that person's name and address with a designated agency." *Id.* (emphasis in original).

with the Arizona Corporation Commission. As such, Plaintiffs' evidence makes Arizona's point: all of LAWA's cited forms of licenses qualify as licenses *or similar* items.

Plaintiffs also invent conflict between IRCA's history and amendments with respect to farm labor contract laws and the Migrant and Seasonal Agricultural Worker Protection Act ("AWPA"). Pet. Br. at 26, 32-34. With respect to the former, the legislative history plainly uses them as a mere example: "licensing or 'fitness to do business laws,' *such as* state farm labor contractor laws or forestry laws". H.R. REP. NO. 99-682(I), at 58, *reprinted in* 1986 U.S.C.C.A.N. at 5662 (emphasis added). Similarly, IRCA's conforming amendments to AWPA are equally consistent with Arizona's or Plaintiffs' views, depending on the breadth (Arizona) or narrowness (Plaintiffs) attributed to the statutory phrase "licensing and similar laws." Plaintiffs tautologically first imagine conflict, then use that imagined conflict as evidence of actual conflict.

Several legal authorities suggest that state corporation commissions "license" corporations upon their filing articles of incorporation. *See, e.g., Goodman v. Darden, Doman & Stafford Associates,* 100 Wash.2d 476, 477-78, 670 P.2d 648, 650 (Wash. 1983) (state issues "corporate license" upon filing of articles of incorporation); *DuVall v. Moore,* 276 F.Supp. 674, 677 (D. Iowa 1967) (same); *Northwestern Nat. Ins. Co. v. Freedy,* 227 N.W. 952, 953-54 (Wis. 1929) (domestic corporation does not require a further license to conduct business within its charter). Certainly, whatever the name that applies, the Arizona Corporation Commission's

approval enables and permits the entity in question to transact business under the corporate form:

> The corporation commission shall have the sole power to issue *certificates of incorporation* to companies organizing under the laws of this state, and to issue *licenses* to foreign corporations to do business in this state.

ARIZ. CONST. art. XV, §5 (emphasis added); *see also* ARIZ. CONST. art. XIV, §17 (providing for payment of a tax "by every domestic corporation, upon the grant, amendment, or extension of its charter, and by every foreign corporation upon its obtaining a license to do business in this state"). Approving a domestic corporation's charter is simply the in-state equivalent of licensing a foreign corporation. Even if that is not a license *per se*, it nonetheless falls within IRCA's broad allowance for state sanctions under "licensing *and similar laws*." 8 U.S.C. §1324a(h)(2) (emphasis added). This is particularly true given the presumption against preemption. Of course, if it wants to tighten IRCA's language and to clarify its preemptive intent, Congress remains free to do so.

III. FEDERAL LAW DOES NOT IMPLIEDLY PREEMPT THE LICENSING SANCTION

Plaintiffs argue that IRCA impliedly preempts LAWA by undermining both national uniformity and the "careful balance" that IRCA strikes between discouraging illegal immigration, preventing discrimination, and minimizing the burden on

employers. Pet. Br. at 37-46.[8] Conflict preemption includes both "conflicts that make it *impossible* for private parties to comply with both state and federal law" and "conflicts that *prevent or frustrate* the accomplishment of a federal objective." *Geier v. Am. Honda Motor Co.*, 529 U.S. 861, 873-74 (2000) (interior quotations omitted, emphasis added). Because nothing prevents compliance with both federal law and LAWA, Plaintiffs necessarily invoke the second prong of conflict preemption.[9]

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[8] Plaintiffs also argue that – unlike express preemption – conflict preemption has no presumption against preemption. *Id.* at 37 (*citing Wyeth v. Levine*, 129 S. Ct. 1187, 1220 (2009) (Alito, J., dissenting)). However true that may be in general, it is irrelevant here because numerous alternate rules of construction lead to the same conclusion. *U.S. v. Bass*, 404 U.S. 336, 349 (1971) ("[u]nless Congress conveys its purpose clearly, it will not be deemed to have significantly changed the federal-state balance"); *Gonzales v. Oregon*, 546 U.S. 243, 275 (2006) (state law remains applicable where "Congress did not have this far-reaching intent to alter the federal-state balance and the congressional role in maintaining it"); *Chem. Mfrs. Ass'n*, 470 U.S. at 128 ("absent an expression of legislative will, we are reluctant to infer an intent to amend the Act so as to ignore the thrust of an important decision"); *Nat'l Ass'n of Home Builders v. Defenders of Wildlife*, 551 U.S. 644, 646 (2007) ("repeals by implication are not favored and will not be presumed unless the intention of the legislature to repeal [is] clear and manifest") (interior quotations omitted, alteration in original).

[9] Eagle Forum ELDF interprets the question presented as whether IRCA impliedly preempts LAWA's licensing sanction. Read literally, the question ties the "comprehensive scheme" found in *Hoffman Plastic Compounds, Inc. v. NLRB*, 535 U.S. 137, 147 (2002), to implied preemption. The question whether federal law is sufficiently comprehensive to remove the National Labor Relations Board ("NLRB") from a sphere, as a

(Footnote cont'd on next page)

Eagle Forum ELDF respectfully submits that this prevent-or-frustrate preemption "wander[s] far from the statutory text" and improperly "invalidates state laws based on perceived conflicts with broad federal policy objectives, legislative history, or generalized notions of congressional purposes that are not embodied within the text of federal law." *Wyeth*, 129 S.Ct. at 1205 (characterizing this prong as "'purposes and objectives' pre-emption") (Breyer, J., concurring); *cf. Crosby v. National Foreign Trade Council*, 530 U.S. 363, 373 (2000) ("the categories of preemption are not 'rigidly distinct,' [and] 'field pre-emption may be understood as a species of conflict pre-emption'") (*quoting English v. General Elec. Co.*, 496 U.S. 72, 79, n.5 (1990)). Because not every difference qualifies as sufficient conflict or frustration to preempt state law, Plaintiffs cannot prevail on this theory unless the federal presence qualifies as field preemption.

Contrary to Plaintiffs' procrustean approach, federalism permits and encourages state and local government to experiment with measures that enhance the general welfare and public safety. This federalism is central to our system of government:

(Footnote cont'd from previous page.)

matter of statutory interpretation, is an inherently different question from whether Congress intended to remove state sovereigns from that sphere. *See id.* ("where [NLRB's] chosen remedy trenches upon a federal statute or policy outside [NLRB's] competence to administer, [NLRB's] remedy may be required to yield"). It is consistent for IRCA comprehensively to remove NLRB without comprehensively removing the states.

> [F]ederalism was the unique contribution of the Framers to political science and political theory. Though on the surface the idea may seem counter-intuitive, it was the insight of the Framers that freedom was enhanced by the creation of two governments, not one.

U.S. v. Lopez, 514 U.S. 549, 576 (1995) (Kennedy, J., concurring); "The Framers adopted this constitutionally mandated balance of power to reduce the risk of tyranny and abuse from either front, because a federalist structure of joint sovereigns preserves to the people numerous advantages." *Wyeth*, 129 S.Ct. at 1205 (interior quotations and citations omitted) (Breyer, J., concurring). Thus, absent express preemption, field preemption, or sufficient actual conflict, the federal system assumes that the states retain their role.

Perhaps because they elected to bring a pre-enforcement facial challenge, Plaintiffs misperceive how LAWA operates. Whereas Plaintiffs fear state adjudication of employees' federal immigration status, LAWA requires the state to utilize not only federal standards, but also federal proof. *See* Arizona Br. at 48-53. As Arizona explains, the prosecution must obtain information on immigration status from the federal government pursuant to 8 U.S.C. §1373(c), but for purposes of LAWA the defense can rebut this federal information to show that the employer acted lawfully. By contrast, the prosecution's case can succeed only if supported by the federal information. Arizona Br. at 49. Nothing

in LAWA conflicts with federal primacy in determining an employee's immigration status.[10]

In any event, Plaintiffs' "careful balance" argument is too insufficient a federal interest to displace Arizona's police power over an issue of dual federal-state concern. Specifically, the balance argument posits that IRCA carefully balanced employing illegal aliens, discrimination, and burdens on employers. The first of these interests is an issue of dual federal-state concern. *DeCanas*, 424 U.S. at 357. Congress addressed the second issue by enacting 8 U.S.C. §1324b, which "ensure[s] that employers do not engage in racial, ethnic, or other invidious discrimination against legal immigrants and other minorities." U.S. Br. at 2. Because Congress has armed the potential victims of discrimination with a means to redress any discrimination that occurs, Congress has balanced the discrimination issue. If Arizona's actions indeed expand the number of instances of that discrimination, the two sides (employers and potential work-authorized employees) nonetheless remain balanced by §1324b. Finally, while federal reticence for burdens imposed on employers is admirable, federal floors do not automatically constitute ceilings in every case. Nothing in IRCA suggests that Congress intended to displace state or

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[10] Plaintiffs lack standing to challenge the ability of Arizona employers who are guilty under federal standards to escape state-law liability based on state evidentiary standards that allow the defense (but not the prosecution) to rebut a federal determination that the employer employed an illegal alien.

local police power to regulate employers to address local issues and concerns.

In their "careful balance" arguments, Plaintiffs also cite decisions from litigation under inapposite statutory contexts to raise the specter of a "patchwork of ... [different] laws, rules, and regulations." Pet. Br. at 15 (*quoting Rowe v. N.H. Motor Trans. Ass'n*, 552 U.S. 364, 373 (2008), alterations by Plaintiffs). *Rowe* concerned the Airline Deregulation Act, where Congress intended "maximum reliance on competitive market forces" (*id.* at 993) and "to leave such decisions, where federally unregulated, to the competitive marketplace" (*id.* at 996). Here, by contrast, §1324a(h)(2) *expressly saves* state and local authority in a field within the historic state and local police power. Similarly, Plaintiffs ground their claim that the Act's licensing sanction conflicts with federal law by citing cases where state or local sanctions conflicted with U.S. foreign policy. Pet. Br. at 40-41, 45 (*citing American Ins. Ass'n v. Garamendi*, 539 U.S. 396, 427 (2003) *and Crosby v. Nat'l Foreign Trade Council*, 530 U.S. 363, 380 (2000)). Foreign policy represents an area where the federal power is at its zenith, *Japan Line, Ltd. v. County of Los Angeles*, 441 U.S. 434, 449 (1979), but this case raises no such concerns. As such, *Garamendi* and *Crosby* are inapposite.

Neither Plaintiffs' patchwork argument nor its federal-balance argument make it *impossible* to comply with both LAWA and federal law. And the differences between LAWA and federal law are insufficient conflict to displace Arizona's valid exercise of its policy power. As such, Plaintiffs'

conflict-preemption challenge to Arizona's licensing sanction must fail.

IV. THE VOLUNTARY FEDERAL E-VERIFY PROGRAM DOES NOT PREEMPT ARIZONA'S E-VERIFY MANDATE

Plaintiffs put forward two basic arguments against Arizona's E-Verify mandate. First, Plaintiffs argue that the heading to the statutory section that authorizes E-Verify includes the word "voluntary" and that federal law prohibits the Department of Homeland Security from mandating E-Verify outside of certain federal agencies, contractors, and IRCA violators. Pet. Br. at 47-50. Second, relying primarily on *Geier v. Am. Honda Motor Co.*, 529 U.S. 861 (2000), Plaintiffs argue that Arizona cannot mandate E-Verify because Congress adopted it as a voluntary program for federal purposes. Pet. Br. at 50.[11] Plaintiffs' first argument is makeweight, and its second does not fare much better.

The use of the word "voluntary" to describe E-Verify in a statutory heading does not carry much, if any weight. *Florida Dept. of Revenue v. Piccadilly Cafeterias, Inc.*, 128 S.Ct. 2326, 2336 (2008) ("a subchapter heading cannot substitute for the operative text of the statute"); *Zimmerman v. Oregon Dep't of Justice*, 170 F.3d 1169, 1175 (9th Cir. 1999) (courts look to headings to resolve – not to create –

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[11] Plaintiffs also raise a fear of the states' adopting "50 different [regulatory] regimes," *id.* at 51 (*quoting Bates*, 544 U.S. at 451-53, Plaintiffs' alteration), which is puzzling because Arizona merely mandated a federal program (*i.e.*, the state regime is not "different").

doubt); *Whitman v. American Trucking Associations*, 531 U.S. 457, 483 (2001) (headings can "only she[d] light on some ambiguous word or phrase in the statute itself") (internal quotations omitted, alteration in original). Plaintiffs also cite IIRIRA §402(a), 110 Stat. at 3009-546, for the proposition that the "Secretary of Homeland Security may not require any person or other entity to participate in [E-Verify]." Pet. Br. at 10. But nothing in that directive – limited to a single federal officer – prohibits all "government" from requiring participation in E-Verify. Moreover, the various steps at which Congress declined to make E-Verify mandatory cannot modify the original non-preemptive intent. *Fourco Glass Co. v. Transmirra*, 353 U.S. 222, 227 (1957) (revised or consolidated laws not "intended to change their effect unless such intention is clearly expressed").

Plaintiffs are not merely wrong but "*quite wrong* to view [the] decision [not to regulate] as the functional equivalent of a regulation prohibiting all States and their political subdivisions from adopting such a regulation." *Sprietsma v. Mercury Marine*, 537 U.S. 51, 65 (2002) (emphasis added). While "an authoritative federal determination that the area is best left *un*regulated ... would have as much pre-emptive force as a decision *to* regulate," *id.* at 66 (emphasis in original), *Geier*, 529 U.S. at 881, Congress has not done so merely by declining to require E-Verify as a matter of federal law.[12]

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[12] Arizona's E-Verify mandate does not discriminate in violation of either IRCA or the Equal Protection Clause. *See*

(Footnote cont'd on next page)

To foreclose state and local regulation, courts require that Congress make an affirmative statement against regulation, not that Congress merely refrain from regulating. *See, e.g., Sprietsma,* 537 U.S. at 67 (*Geier* involved "an affirmative policy judgment that safety would best be promoted if manufacturers installed *alternative* protection systems in their fleets rather than one particular system in every car") (interior quotations omitted, emphasis in original); *Rowe v. N.H. Motor Trans. Ass'n,* 128 S.Ct. 989, 993, 996 (2008) (Airline Deregulation Act intended "to leave such decisions, where federally unregulated, to the competitive marketplace" to enable "maximum reliance on competitive market forces"). The merely voluntary nature of E-Verify as a matter of federal law does not come even close to displacing state authority to mandate its use.

CONCLUSION

For the foregoing reasons and those argued by Arizona, this Court should affirm the Ninth Circuit.

(Footnote cont'd from previous page.)

Section II.C, *supra*. Indeed, if using E-Verify were discriminatory, it would be unlawful merely to *allow* its use. *City of Los Angeles v. Lyons,* 461 U.S. 95, 105-06 (1983); *Simon v. Eastern Kentucky Welfare Rights Org.,* 426 U.S. 26, 45 n.25 (1976). Thus, assuming *arguendo* that E-Verify itself was discriminatory, the voluntary federal E-Verify regime would be every bit as unconstitutional as Plaintiffs allege that Arizona's E-Verify mandate is unconstitutional. As explained, however, whether mandatory or voluntary, E-Verify is not itself discriminatory.

October 28, 2010

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AMICUS CURIAE BRIEF

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CHAMBER OF COMMERCE OF THE UNITED STATES, *et al.*,
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Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF *AMICUS CURIAE* OF THE EQUAL EMPLOYMENT ADVISORY COUNCIL IN SUPPORT OF PETITIONERS

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H.R. Rep. No. 99-682, pt. 1 (1986), *as reprinted in* 1986 U.S.C.C.A.N. 5649..... 17
S. Rep. No. 99-132 (1986)..... 17, 18

OTHER AUTHORITIES

Department of Homeland Security, E-Verify webpage (Sept. 2010)..... 11
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Exec. Order No. 13,465, 75 Fed. Reg. 33,285 (June 6, 2008)..... 2
National Conference of State Legislatures Immigrant Policy Project, *2005-2010 Reports*..... 15
Staff Report of the Select Commission on Immigration and Refugee Policy, *U.S. Immigration and the National Interest* (1981)..... 9

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U.S. Citizenship and Immigration Services, *E-Verify User Manual for Federal Contractors* (June 2010) 12

U.S. Citizenship and Immigration Services, *Frequently Asked Questions: Federal Contractors and E-Verify* (Apr. 2010) 15

Westat, *Findings of the E-Verify Program Evaluation* (Dec. 2009) 13

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BRIEF *AMICUS CURIAE* OF THE EQUAL EMPLOYMENT ADVISORY COUNCIL IN SUPPORT OF PETITIONERS

The Equal Employment Advisory Council respectfully submits this brief as *amicus curiae*.[1] The brief supports the position of Petitioners before this Court in favor of reversal.

[1] The parties have consented to the filing of this brief. No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amicus curiae*, its members, or its counsel made a monetary contribution to its preparation or submission.

INTEREST OF THE *AMICUS CURIAE*

The Equal Employment Advisory Council (EEAC) is a nationwide association of employers organized in 1976 to promote sound approaches to the elimination of discriminatory employment practices. Its membership includes over 300 major U.S. corporations. EEAC's directors and officers include many of the nation's leading experts in the field of equal employment opportunity. Their combined experience gives EEAC an unmatched depth of knowledge of the legal and practical considerations relevant to interpreting and complying with workforce nondiscrimination requirements. EEAC's members are firmly committed to the principles of nondiscrimination and equal employment opportunity.

All of EEAC's members are employers subject to the Immigration Reform and Control Act of 1986 (IRCA), Pub. L. No. 99-603, 100 Stat. 3359, the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), Pub. L. No. 104-208, 110 Stat. 3009, Title VII of the Civil Rights Act of 1964 (Title VII), 42 U.S.C. §§ 2000e *et seq.*, as amended, and other employment-related statutes and regulations. Many of EEAC's members also do business in the state of Arizona and are subject to the Legal Arizona Workers Act (LAWA), Ariz. Rev. Stat. §§ 23-211 *et seq.* In addition, the majority of EEAC members are federal contractors and thus are subject to the requirements of Executive Order 12,989, as amended by Executive Order 13,465. Exec. Order No. 12,989, 61 Fed. Reg. 6091 (Feb. 13, 1996); Exec. Order No. 13,465, 75 Fed. Reg. 33,285 (June 6, 2008).

As large, nationwide employers, EEAC's members have a direct and ongoing interest in the enforcement

of the nation's immigration laws and in hiring and retaining a competent and skilled workforce comprised of individuals who are authorized to work in this country legally. The issue presented in this matter regarding whether LAWA is preempted by IRCA and IIRIRA therefore is extremely important to the nationwide constituency that EEAC represents.

EEAC has an interest in, and a familiarity with, the legal and public policy issues presented to the Court in this case. Furthermore, because of its significant experience in these matters, EEAC is well-situated to brief the Court on the importance of the issues beyond the immediate concerns of the parties to the case.

STATEMENT OF THE CASE

Arizona's Legal Arizona Workers Act (LAWA) was signed into law in July 2007, and became effective on January 1, 2008. Ariz. Rev. Stat. §§ 23-211 *et seq.* It imposes sanctions on employers who knowingly or intentionally employ unauthorized workers. Ariz. Rev. Stat. §§ 23-212.F, 23-212.01.F. Under LAWA, an employer found guilty of a first-time hiring violation can have its license to do business in the state suspended for up to ten days. Ariz. Rev. Stat. §§ 23-212.F.1(c), 23-212.01.F.1(c). The employer also is subject to probation for up to five years, Ariz. Rev. Stat. §§ 23-212.F.1(b), 212.01.F.1(b), and if a second hiring violation during the probationary period is committed, LAWA mandates a permanent revocation of the employer's license. Ariz. Rev. Stat. §§ 23-212.F.2, 212.01.F.2.

LAWA also mandates that employers doing business in Arizona participate in E-Verify, the federal electronic database managed jointly by the Depart-

ment of Homeland Security and the Social Security Administration for verifying the employment authorization of all new hires to a company. Ariz. Rev. Stat. § 23-214.A. An Arizona employer that fails to participate in E-Verify may be denied economic development benefits and forced to repay any benefits previously obtained from the state. Ariz. Rev. Stat. § 23-214.B.

Shortly after LAWA was enacted, Petitioners filed separate lawsuits in the U.S. District Court for the District of Arizona against the State of Arizona and several state officials. Pet. App. 51a. Those lawsuits later were consolidated into this single action. *Id.* Among other things, Petitioners contended that 1) LAWA is expressly and impliedly preempted by the federal Immigration Reform and Control Act of 1986 (IRCA), 8 U.S.C. § 1324a; and 2) LAWA conflicts with Congress' intent to keep E-Verify voluntary. Pet. App. 7a.

At trial, Respondents maintained that LAWA is a "licensing" law and thus is exempt from IRCA's state preemption provisions. Respondents also argued that while Congress established E-Verify as a voluntary system, they never prohibited states from making the program mandatory for employers.

The district court ruled that to the extent LAWA is a licensing law that falls within the savings clause of IRCA's preemption provisions, it is not expressly preempted by IRCA. Pet. App. 61a-63a. It further found that neither LAWA's sanctioning provisions nor its requirement to participate in E-Verify were inconsistent with federal policy and therefore not impliedly preempted by IRCA. *Id.* at 78a-85a. Finally, the district court ruled that although Congress established E-Verify as a voluntary program, it

did not explicitly preclude states from mandating participation. *Id.* at 85a.

On appeal, the Ninth Circuit affirmed, concluding that because LAWA provides for the suspension and permanent revocation of any state-issued license held by an employer, it is a licensing law and therefore not expressly preempted by IRCA. *Id.* at 25a.

The Ninth Circuit also held that LAWA is not impliedly preempted by IRCA because LAWA governs employment, not immigration. It also rejected Petitioners' claim that the LAWA provision mandating E-Verify is preempted because it conflicts with Congress' intent to keep E-Verify voluntary. Pet. App. 19a-22a. The court stated that simply because Congress established E-Verify as a voluntary program does not, in itself, suggest that Congress intended to prevent states from making participation in E-Verify mandatory. *Id.* at 21a. Rather, it found that Congress implicitly encouraged states to use E-Verify by expanding its availability to all 50 states, a purpose it concluded was furthered by LAWA. *Id.*

Petitioners filed a petition for writ of certiorari, which this Court granted on June 28, 2010.

SUMMARY OF ARGUMENT

For centuries, legislating in the field of immigration policy and law has been within the sole province of the federal government. U.S. Const., art. 1, § 8, cl. 4 (giving Congress the power to "establish an uniform Rule of Naturalization"). The Immigration and Nationality Act of 1952 (INA), Pub. L. No. 82-414, 66 Stat. 163, in which Congress laid out a comprehensive plan for the regulating of immigrants coming to and living in the U.S., is the foundation on which current immigration law is based.

As time has passed and economic and cultural changes have taken place, Congress has adjusted U.S. immigration policy and amended the INA to reflect these changes. The first amendment to the INA to address the issue of the employment of aliens was the Immigration Reform and Control Act of 1986 (IRCA), Pub. L. No. 99-603, 100 Stat. 3359. IRCA makes it unlawful for employers to knowingly hire or continue to employ unauthorized aliens and provides a documentation process, the Form I-9 process, by which employers may determine the employment eligibility of their new hires.

IRCA was followed by the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), Pub. L. No. 104-208, 110 Stat. 3009, which further amended the INA by providing employers, on a voluntary basis, with a federal electronic database through which they could further verify the employment authorization of their new hires. This database, now known as E-Verify, compares information collected by the employer on the Form I-9 with information in an electronic database administered by the Department of Homeland Security (DHS) and the Social Security Administration (SSA). If the information matches, the employer receives confirmation from E-Verify that the new hire is work-authorized. If the information does not match, the employer and employee must begin the process of resolving the tentative nonconfirmation (TNC).

Together IRCA and IIRIRA provide a uniform and carefully-crafted federal mechanism for regulating the employment of aliens in the U.S. *See Nat'l Ctr. for Immigrants' Rights, Inc. v. INS*, 913 F.2d 1350, 1366 (9th Cir. 1990) (federal immigration law is "a carefully crafted political compromise which at every

level balances specifically chosen measures discouraging illegal employment . . ."), *rev'd on other grounds*, 502 U.S. 183 (1991). To the extent that a state law seeks to regulate in the area of immigration in a manner inconsistent with federal law, it is preempted. As this Court has said:

> [W]here the federal government, in the exercise of its superior authority in this field [of immigration], has enacted a complete scheme of regulation and has therein provided a standard for the registration of aliens, states cannot, inconsistently with the purpose of Congress, conflict or interfere with, curtail or complement, the federal law, or enforce additional or auxiliary regulations.

Hines v. Davidowitz, 312 U.S. 52, 66-67 (1941) (footnote omitted); *see also Buckman Co. v. Plaintiffs' Legal Comm.*, 531 U.S. 341, 348-50 (2001).

There currently are no fewer than 41 state laws purporting to regulate in the area of immigration as it relates to employment. A number of these state and local immigration laws include additional and sometimes stricter requirements than those imposed on employers by federal law. These inconsistent and overlapping state laws conflict with the federal government's comprehensive plan to regulate the employment of aliens, and make it increasingly more difficult for employers to ensure full compliance.

ARGUMENT

I. ARIZONA'S STATE IMMIGRATION LAW CONFLICTS WITH FEDERAL IMMIGRATION LAW AND POLICY AND THEREFORE IS PREEMPTED

A. It Is Within The Sole Province Of The Federal Government To Establish A Comprehensive Scheme For The Regulation Of Immigration In The United States

1. The Immigration and Nationality Act establishes the foundation for uniform federal immigration policy

Going as far back as 1790, Congress has legislated in the area of federal immigration.[2] In 1952, Congress enacted the Immigration and Nationality Act (INA), Pub. L. No. 82-414, 66 Stat. 163, which established a uniform federal policy for the admission of aliens into the United States. The INA consolidated and gave structure to what had been an *ad hoc* assortment of previous measures, and today stands as the basis for all federal immigration policy.

More recently, Congress enacted the Immigration Reform and Control Act of 1986 (IRCA), Pub. L. No. 99-603, 100 Stat. 3359, which amended the INA to, among other things, strengthen federal immigration policy by addressing the issue of the employment of aliens and the responsibilities of employers for hiring only authorized workers. IRCA makes it unlawful "to hire, or to recruit or refer for a fee for employment in

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[2] For example, the Naturalization Act of 1790, the Chinese Exclusion Act in 1882, the Emergency Immigration Act in 1921, and the Immigration Act of 1924.

the United States an alien knowing the alien is an unauthorized alien . . . ." 8 U.S.C. § 1324a(a)(1)(A).

At that time, at least twelve states had enacted independent employer sanctions laws prohibiting the "knowing" employment of unauthorized aliens.[3] Congress responded by enacting IRCA so as to ensure consistent and uniform federal immigration policy. IRCA specifies that "[t]he provisions of [8 U.S.C. § 1324a] preempt any State or local law imposing civil or criminal sanctions (other than through licensing and similar laws) upon those who employ, or recruit or refer for a fee for employment, unauthorized aliens." 8 U.S.C. § 1324a(h)(2). The legislative history further expresses Congress' intent to be the sole voice of national immigration policy. *See* Pub. L. No. 99-603, § 115, 100 Stat. at 3384. ("It is the sense of Congress that . . . the immigration laws of the United States should be enforced vigorously and *uniformly*") (emphasis added).

This Court has recognized the federal government's unique role in the formulation of U.S. immigration policy. As it observed in *Toll v. Moreno*:

> Our cases have long recognized the preeminent role of the Federal Government with respect to the regulation of aliens within our borders. Federal authority to regulate the status of aliens derives from various sources, including the Federal Government's power '[to] establish [a] uniform Rule of Naturalization,' its power '[to] regulate Commerce with foreign Nations,' and its broad authority over foreign affairs.

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[3] Staff Report of the Select Commission on Immigration and Refugee Policy, *U.S. Immigration and the National Interest* 565 (1981).

458 U.S. 1, 10 (1982) (citations omitted). *See also Zadvydas v. Davis,* 533 U.S. 678, 700 (2001) (where the Court recognized "the Nation's need to 'speak with one voice' in immigration matters") (citation omitted).

2. IRCA is, and was intended to be, the sole federal mechanism for regulating the employment of aliens in the U.S.

In order to ensure full compliance with the statute, IRCA contains an employment eligibility verification system, known as the I-9 process, which requires employers to review documents presented by a new hire that establish the individual's identity and work authorization, and then to attest to this examination and verification. 8 U.S.C. § 1324a(b). IRCA specifies what form employers are to use (DHS Form I-9), the documents that employees may present to show identity and work authorization, and the retention and recordkeeping requirements for those forms and documents. *Id.* The statute provides a safe harbor for employers who comply in good faith with its employment eligibility verification requirements, 8 U.S.C. § 1324a(a)(3), but also establishes an adjudication process for employers not in compliance. 8 U.S.C. § 1324a(e). If a violation is found to have occurred, IRCA specifies civil and criminal sanctions for employers, including graduated monetary penalties, civil injunctions, criminal fines or imprisonment. 8 U.S.C. §§ 1324a(e)(4), 1324a(f).

3. IIRIRA further demonstrates Congress' intent to establish a uniform, federal system of immigration enforcement

Ten years after the enactment of IRCA, Congress passed the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), Pub. L. 104-208, 110 Stat. 3009. IIRIRA established what was then referred to as the Basic Pilot Program and now is known as E-Verify.

E-Verify provides a supplementary means for employers to verify the employment eligibility of their new hires. Through E-Verify, employers access an electronic database jointly administered by the Department of Homeland Security (DHS) and the Social Security Administration (SSA) in order to verify the documentation provided by the employee for completion of the I-9. E-Verify has been adopted by over 216,000 employers with, on average, an additional 1,400 users being added every week.[4]

When E-Verify initially was established, participation was voluntary and not available in all states. Since then, the program has been expanded and made available to employers on a voluntary basis in all 50 states. In 2008 President Bush signed Executive Order 13,465, which mandates E-Verify participation by most federal contractors for both new hires and existing employees with respect to non-exempt contracts that were entered into on or after January 15, 2009, and to certain indefinite-delivery/ indefinite-quantity (IDIQ) contracts that are modified after that date.

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[4] Dep't of Homeland Sec., E-Verify webpage, http://www.dhs.gov/files/programs/gc_1185221678150.shtm (last visited Sept. 2, 2010).

Participation in E-Verify requires not only the completion of the I-9 form, but also that the employer enter the I-9 data into the E-Verify system and await final confirmation or nonconfirmation from DHS and/or SSA. U.S. Citizenship and Immigration Servs., *E-Verify User Manual for Federal Contractors* 16 (June 2010).[5] In the event of a tentative nonconfirmation (TNC), the employer must contact the affected employee, advise the individual of his or her available options, and provide a form on which the employee must indicate whether he or she plans to contest the TNC. *Id.* at 27, 36.

If the employee chooses to contest the TNC, the employer must generate for the employee through E-Verify a referral letter to either the SSA or DHS. *Id.* at 30, 39. If the employee chooses not to contest the TNC, then the employer must consider terminating the employee or face possible sanctions for knowingly employing an illegal alien. *Id.* at 27, 36. If the employee does contest the TNC, the employer must continue to monitor E-Verify for a final response regarding the employee's authorization to work. *Id.* at 32-33, 42-43.

During this time, the employer is required to keep the employee on its payroll, begin integrating the individual into the employer's workforce and, in some cases, begin training this individual, who ultimately may be found to be unauthorized to work legally in the U.S. The average time lapse between an employer's initiation of a single E-Verify inquiry and

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[5] *Available at* http://www.uscis.gov/USCIS/E-Verify/Customer%20Support/E-Verify%20User%20Manual%20for%20Federal%20Contractors_Final.pdf

resolution of a tentative nonconfirmation is 12.6 days.[6]

B. Together, IRCA And IIRIRA Establish A Uniform Method For Verifying The Employment Eligibility Of New Hires, Thus Preempting Inconsistent State And Local Laws

IRCA, as augmented by IIRIRA, was intended to comprise a uniform and comprehensive scheme designed to ensure the work authorization of the U.S. workforce. For Arizona, and other state and local governments, to attempt to supplement this inclusive and standardized strategy is to disregard the careful balance established by Congress.

This Court has recognized the danger in allowing states to interfere with the uniform enforcement of federal law. In *Hillsborough County* v. *Automated Medical Laboratories, Inc.*, the Court explained that

> Congress' intent to pre-empt all state law in a particular area may be inferred where the scheme of federal regulation is sufficiently comprehensive to make reasonable the inference that Congress 'left no room' for supplementary state regulation. Pre-emption of a whole field also will be inferred where the field is one in which 'the federal interest is so dominant that the federal system will be assumed to preclude enforcement of state laws on the same subject.'

471 U.S. 707, 713 (1985) (quoting *Rice* v. *Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947)). *See also*

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[6] Westat, *Findings of the E-Verify Program Evaluation* (Dec. 2009), *available at* http://www.uscis.gov/USCIS/E-Verify/E-Verify/Final%20E-Verify%20Report%2012-16-09_2.pdf

Crosby v. National Foreign Trade Council, 530 U.S. 363, 372-73 (2000) (a state or local law is conflict preempted if it "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress" and field preempted if it operates in an area that Congress intends federal law to occupy) (citation omitted).

As the Court observed in *International Paper Co. v. Ouellette*, the "inevitable result" of state laws that impose separate standards on a single source "would be a serious interference with the achievement of the 'full purposes and objectives of Congress.'" 479 U.S. 481, 493 (1987) (citation omitted). *See also Geier v. American Honda Motor Co.*, 529 U.S. 861, 881 (2000) ("Because the rule of law for which petitioners contend would have stood as an obstacle to the accomplishment and execution of the important means-related federal objectives that we have just discussed, it is pre-empted").

II. THE VAST RANGE AND VARIETY OF STATE AND LOCAL IMMIGRATION LAWS MAKE IT VIRTUALLY IMPOSSIBLE FOR EMPLOYERS TO ENSURE FULL COMPLIANCE, THEREBY UNDERMINING THE EFFECTIVENESS OF FEDERAL IMMIGRATION POLICY

A. Including Arizona, There Are No Fewer Than Forty-One States Purporting To Regulate In The Area Of Immigration As It Relates To Employment, Rendering Compliance Extremely Difficult

According to the National Conference of State Legislatures (NCSL), between 2005 and the first half

of 2010, state legislatures have enacted 981 laws related to immigrants and immigration, of which 115 deal with the issue of employment. NCSL Immigrant Policy Project, *2005-2010 Reports*.[7] Those 115 laws span 41 different states. Eleven of those states require some level of participation by employers in E-Verify. *Id.* This patchwork of state requirements makes the verification process unnecessarily cumbersome and contributes nothing of value to the overall objective of controlling illegal immigration.

For employers who are not required as federal contractors to participate in E-Verify, but must do so because of state or local laws, they must choose between participating in E-Verify only at those state-required locations or undertaking the time-consuming and resource-intensive course of action required to participate in E-Verify at all of their operations nationwide. For federal contractors who already are required to participate in E-Verify, only those entities within the company that have actually signed the federal contract are required to participate in E-Verify.[8] For example, Company A has ten divisions, but only Divisions 1, 3 and 9 have signed federal contracts. Consequently, only Divisions 1, 3 and 9 are required to participate in E-Verify with respect to new hires and existing employees.

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[7] *Available at* http://www.ncsl.org/default.aspx?tabid=19897 (last visited Aug. 25, 2010).

[8] U.S. Citizenship and Immigration Servs., *Frequently Asked Questions: Federal Contractors and E-Verify* (Apr. 2010), *available at* http://www.uscis.gov/portal/site/uscis/menuitem.5af9bb95919f35e66f614176543f6d1a/?vgnextoid=30edde1d67ee4210VgnVCM100000082ca60aRCRD&vgnextchannel=534bbd181e09d110VgnVCM1000004718190aRCRD (last visited Aug. 25, 2010).

However, if any of Company A's Divisions have facilities in Arizona or any other state requiring E-Verify participation, Company A and those Divisions must identify those facilities and determine to what extent participation in E-Verify is required for each facility, the Division, and/or the company. For large companies that have centralized their employment verification operations, juggling their E-Verify compliance obligations at both the state and federal level can be extremely difficult.

B. State And Local Immigration Laws And Ordinances Often Include Additional And Stricter Requirements Than Those Imposed On Employers By Federal Law

In addition to requiring employers to participate in E-Verify, certain individual state laws also impose additional and sometimes stricter requirements on employers. For instance, West Virginia requires employers to complete the verification of employment eligibility *prior to* their first day of work, whereas federal law gives the employer up to three days after the start of employment to complete the I-9 Form. W. Va. Code § 21-1B-3. Illinois, Colorado, Georgia, and Nebraska require employers to complete additional attestation forms to be filed with the state in conjunction with the employment eligibility process. 820 Ill. Comp. Stat. 55/12; Colo. Rev. Stat. § 8-2-122; Ga. Code Ann. § 13-10-91(b); Neb. Rev. Stat. § 48-2911.[9]

Louisiana restricts the number and types of documents employers may accept to verify work authori-

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[9] *Available at* http://nebraskalegislature.gov/laws/statutes.php?statute=48-2911

zation status to those approved by state authorities. La. Rev. Stat. § 23:992.2.

Also, Georgia and South Carolina impose special tax withholding requirements on employers who fail to collect additional information from employees beyond that required in the I-9 or E-Verify processes. Ga. Code Ann. § 48-7-101(i); S.C. Code Ann. § 12-8-595(A)-(B). Oklahoma requires employers to verify the employment eligibility of independent contractors, Okla Stat. tit. 68, § 2385.32, even though federal law does not, 8 C.F.R. § 274a.1(f)-(g), and Maine prohibits an employer who has been found to have employed an illegal alien from sponsoring and obtaining a visa for an H-2A temporary or seasonal agricultural worker. Me. Rev. Stat. Ann., tit. 26, § 871(1-A).

C. It Was Not Congress' Intent For The Verification Of Employment Eligibility To Impose A Substantial Burden On Employers

In crafting a uniform system of federal employment eligibility and verification laws, Congress was sensitive to the burden these new requirements would place on employers. It viewed IRCA as a means of deterring illegal immigration while at the same time being "the least disruptive to the American businessman." H.R. Rep. No. 99-682, pt. 1, at 56 (1986), *as reprinted in* 1986 U.S.C.C.A.N. 5649, 5660; S. Rep. No. 99-132, at 8-9 (1986). "The legislative history of [IRCA] indicates that Congress intended to minimize the burden and the risk placed on the employer in the verification process." *Collins Foods Int'l, Inc. v. INS*, 948 F.2d 549, 554 (9th Cir. 1991). Congress expressed particular concern that the law not impose excessive burdens on small businesses or for isolated

violations. *See, e.g.*, H.R. Conf. Rep. No. 99-1000, at 86 (1986), *as reprinted in* 1986 U.S.C.C.A.N. 5840, 5841; S. Rep. No. 99-132, at 32 (1986).

Congress intended the federal government to be the sole regulator of U.S. immigration law and policy. Individual state laws such as Arizona's undermine this intent, and add unnecessary requirements to an already comprehensive scheme for managing the employment of aliens in the United States.

CONCLUSION

For the foregoing reasons, the decision below should be reversed.

Respectfully submitted,

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September 2010

AMICUS CURIAE BRIEF

No. 09-115

In The
Supreme Court of the United States

CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA, et al.,

Petitioners,

v.

MICHAEL B. WHITING, et al.,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF FOR *AMICUS CURIAE* IMMIGRATION REFORM LAW INSTITUTE IN SUPPORT OF RESPONDENTS

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INTEREST OF *AMICUS CURIAE*[1]

Amicus Curiae Immigration Reform Law Institute (IRLI) is a legal non-profit 501(c)(3) corporation specializing in immigration law. *Amicus Curiae* frequently assists State and local governments in the drafting of legislation to deter unlawful immigration. This legislation includes employer sanctions in accordance with 8 U.S.C. § 1324a(h)(2) and E-verify laws. Petitioners recognize this interest. *See* Pet. Cert. Br. 15.

Amicus Curiae has an interest in the Court having a well-informed and accurate understanding of Congress's purpose and objective in enacting the Immigration Reform and Control Act and its relation to the States' traditional powers concerning licensing.

SUMMARY OF ARGUMENT

The question presented is whether Arizona's licensing scheme that imposes sanctions on employers who hire unauthorized aliens is preempted through

[1] Pursuant to this Court's Rule 37.6, *Amicus Curiae* states that no counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than the *Amicus Curiae*, or its counsel, made a monetary contribution to its preparation or submission. The parties have consented to the filing of this brief, and letters evidencing such consent have been filed with the Clerk of this Court pursuant to this Court's Rule 37.3.

the Court's express and implied preemption doctrines. Arizona's licensing scheme is saved from preemption because it falls within the savings clause of 8 U.S.C. § 1324a(h)(2), which permits State and local governments to prescribe employer sanctions through "licensing and similar laws," and comports with the purpose and objective of the Immigration Reform and Control Act of 1986 (IRCA).

When enacting IRCA, Congress did so with the purpose and objective of curtailing unlawful immigration through the use of employer sanctions, leaving to States and local governments the authority to enact analogous legislation "through licensing and similar laws." Petitioners are correct that the legislative history reveals that IRCA sought to "balance" multiple interests, but they mischaracterize those interests and their relative importance within the scheme of employer sanctions and section 1324a(h)(2)'s savings clause, and exclude the interests of State and local governments. Pet. Br. 20-46.

The use of legislative history for preemption analysis requires more than selective quotations from the House Report to ascertain the preemptive intent of section 1324a(h)(2). *See Harrison v. PPG Industries, Inc.*, 446 U.S. 578, 592 (1980). Instead, legislative history – for the purpose of preemption analysis – requires the historical inquiry be conducted in a manner that incorporates "additional information" and places it in context. *Wisconsin Pub. Intervenor v. Mortier*, 501 U.S. 597, 611 (1997).

IRCA's legislative history is important because it establishes that Arizona's licensing scheme is in harmony with IRCA's purpose and objective and 8 U.S.C. § 1324a(h)(2)'s savings clause, and is thus not preempted. *Northwest Central Pipeline Corp. v. State Corporation Comm'n*, 489 U.S. 493, 515 n.12 (1989). However, should the Court find the history of IRCA's purpose and objective to be inconclusive, the result remains the same under the presumption against preemption, and Arizona's licensing scheme is saved from preemption, express or implied. As the Court held in *Altria Group, Inc. v. Good*, 129 S. Ct. 538, 543 (2008), when the purpose and objective of a federal statute is "susceptible [to] more than one plausible reading," the presumption against preemption requires that the Court should "accept the reading that disfavors pre-emption."

ARGUMENT

I. THE PRESUMPTION AGAINST PREEMPTION REQUIRES EXAMINATION OF IRCA'S LEGISLATIVE HISTORY IN THE CONTEXT OF ITS PURPOSE AND OBJECTIVE

When Congress establishes a uniform statutory scheme, the "appropriate inquiry" for preemption analysis is whether the concurrent State regulation is "consistent" with the "purposes and objectives" of that scheme. *United States v. Locke*, 529 U.S. 89, 115 (2000). In this case, the uniform statutory scheme is the 1986 Immigration Reform and Control Act

(IRCA), Pub. L. No. 99-603, 100 Stat. 3359, which imposes civil and criminal sanctions on employers that unlawfully hire unauthorized aliens. When enacting IRCA, Congress expressly preempted State and local governments from "imposing civil or criminal sanctions ... upon those who employ, or recruit or refer for a fee for employment, unauthorized aliens," but saved from preemption "any State or local law" that imposes sanctions "through licensing and similar laws[.]" 8 U.S.C. § 1324a(h)(2).

The express language of 8 U.S.C. § 1324a(h)(2) affirms that Congress intended to save from preemption the traditional State power of imposing "licensing" sanctions on businesses that knowingly employ unlawful aliens. Petitioners agree with this statutory interpretation, but want the Court to limit the definition of "license" to "'fitness to do business laws,' such as state farm labor contractor laws," Pet. Br. 25 (quoting H.R. Rep. No. 99-682(I), at 58, *reprinted in* 1986 U.S.C.A.N. 5649), and to bar States from establishing any "alternate investigatory and adjudicatory systems" to enforce their respective licensing scheme, *id.* at 39.

This statutory interpretation cannot survive. Neither this Court's preemption doctrine nor IRCA's legislative history support Petitioners' reading of 8 U.S.C. § 1324a(h)(2)'s savings clause. Petitioners are correct that legislative history is an important judicial tool in determining a statute or statutory scheme's purpose for either express or implied preemption analysis. *Wyeth v. Levine*, 129 S. Ct. 1187,

1195 (2009) ("In order to identify the "purpose of Congress," it is appropriate to briefly review the history"). However, the presumption against preemption applies when addressing questions of express or implied preemption. *Cipollone v. Liggett Group*, 505 U.S. 504, 518, 523 (1992); *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 485 (1996); *Altria Group, Inc.*, 129 S. Ct. at 543. The presumption requires that the Court begin with the "assumption that the historic police powers of the States [are] not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress." *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947). This assumption "applies with particular force when Congress has legislated in a field traditionally occupied by the States" such as business licenses and articles of incorporation. *Altria Group, Inc.*, 129 S. Ct. at 543.

The presumption against preemption also applies when examining legislative history. The Court works under the presumption that "federal legislation threatening to trench on the States' arrangements for conducting their own governments [is to] be treated with great skepticism, and read in a way that preserves the States' chosen disposition of its own power[.]" *Nixon v. Mo. Mun. League*, 541 U.S. 125, 140 (2004).

Indeed, the examination of legislative history can sometimes reveal that Congress had a narrower purpose than the "strict language" of the statute. *Id.* ("If a federal law contains an express pre-emption clause, it does not immediately end the inquiry because the question of the substance and scope of

Congress' displacement of the state law remains."). However, it is the rare case where the "plain meaning" and "literal application of a statute will produce a result demonstrably at odds with the intentions of its drafters." *United States v. Ron Pair Enters.*, 489 U.S. 235, 242 (1989) (quoting *Griffin v. Oceanic Contractors, Inc.*, 458 U.S. 564, 571 (1982)).

This is why the legislative history is important in preemption analysis. It requires that the intent of Congress be "clear and manifest" to rebut the presumption against preemption. *Bates v. Dow Agrosciences L.L.C.*, 544 U.S. 431, 485 (2005) (citations omitted); *see also Medtronic, Inc.*, 518 U.S. at 486 ("Also relevant ... is the structure and purpose of the statute as a whole ... the way in which Congress intended"). This presumption applies to both express and implied preemption challenges. It is not enough for Petitioners to claim that they have conducted a legislative history, and assert a "plausible alternative reading" of 8 U.S.C § 1324a(h)(2). *See Bates*, 544 U.S. at 485. Instead, Petitioners must affirmatively show that either the "statutory structure [or] legislative history points to a commitment by Congress" to preempt the State legislation in question. *Nixon*, 541 U.S. at 141; *see also Wisconsin Pub. Intervenor*, 501 U.S. at 611-612 (legislative history should provide a "clear and manifest indication that Congress sought to supplant local authority").

To paraphrase, if Petitioners cannot provide legislative history that affirmatively conveys Congress's clear and manifest purpose was to limit the

States' power to employ "licensing and similar laws," the statute is "susceptible [to] more than one plausible reading," and the Court should "accept the reading that disfavors pre-emption." *Altria Group, Inc.*, 129 S. Ct. at 543 (citations omitted).

II. IRCA'S LEGISLATIVE HISTORY REVEALS THAT CONGRESS'S PURPOSE AND OBJECTIVE WAS TO CONTROL THE BORDER THROUGH EMPLOYER SANCTIONS

In enacting IRCA, the purpose and objective of Congress was to establish "penalties for employers who knowingly hire undocumented aliens, thereby ending the magnet that lures them to this country." H.R. Rep. No. 99-682(I), at 45-46. Congress enacted IRCA believing that "employer sanctions" were the "principal means of ... curtailing illegal immigration[.]" *Id.* at 46. Congress elaborated on this purpose and objective in the House Report:

> Employment is the magnet that attracts aliens here illegally or ... leads them to accept employment in violation of their status. Employers will be deterred by the penalties in this legislation from hiring unauthorized aliens and this ... will deter aliens from entering illegally or violating their status in search of employment.

Id.; *see also* Sen. Rep. No. 99-132, at 1. Conversely, Petitioners argue that in establishing IRCA's employer sanctions scheme, Congress sought to "balance multiple, sometimes competing, objectives," including

"deterring illegal immigration, protecting applicants from discrimination, accommodating privacy concerns, and minimizing burdens on employers." Pet. Br. 2. Petitioners argue that the Arizona Statute disrupts IRCA's balance and "fundamental purpose of establishing a national and "uniform" system of regulating alien employment[.]" *Id.* at 17. In making this argument, Petitioners claim that "IRCA's history and structure" shows Congress's "clear" purpose for including a savings clause was so that "States could rely on federal determinations of compliance with federal immigration laws when issuing business licenses or permits to farm labor contractors." *Id.*

In conducting their legislative history analysis, Petitioners never cite to the contemporaneous legislative debates concerning IRCA. Instead, Petitioners rely solely on Part I of House Report 99-682, which states:

> The penalties contained in this legislation are intended to specifically preempt any state or local laws providing civil fines and/or criminal sanctions on the hiring, recruitment or referral of undocumented aliens. They are not intended to preempt or prevent lawful state or local processes concerning the suspension, revocation or refusal to reissue a license to any person who has been found to have violated the sanctions provisions in this legislation. Further, the Committee does not intend to preempt licensing or "fitness to do business laws," such as state farm labor contractor laws or forestry laws, which

> specifically require such licensee or contractor to refrain from hiring, recruiting or referring undocumented aliens.

H.R. Rep. No. 99-682(I), at 58. Petitioners' textual and historical analysis of the House Report fails for three reasons. First, Petitioners failed to read the entire House Report in the context of IRCA's purpose and objective, which is to curtail illegal immigration through the utilization of employer sanctions. *Id.* at 47 ("Since most undocumented aliens enter this country to find jobs, the Committee believes it is essential to require employers to share the responsibility to address this problem."). Second, Petitioners focus solely on the phrase "fitness to do business laws," but completely ignore the context of the phrase within the paragraph. *Compare* Pet. Br. 24-28, *with* Res Br. 39-43. The words "further" and "such as" are key to interpreting the paragraph. They demonstrate that Congress was merely providing additional examples of State laws that it intended not to preempt, rather than, as Petitioners incorrectly suggest, an exhaustive list. H.R. Rep. No. 99-682(I), at 58; *see infra* pp. 20-21.

Third, and most importantly, Petitioners' view that the Court should base its interpretation of 8 U.S.C. § 1324a(h)(2) on the non-statutory phrase "fitness to do business laws" does not provide a "fair understanding of congressional purpose," *Cipollone*, 505 U.S. at 530, and would undermine the cornerstone principle that "the purpose of Congress is the ultimate touchstone in every pre-emption case,"

Medtronic, Inc., 518 U.S. at 485 (citations omitted). The legitimate use of legislative history requires more than the selective quotation of five words in a House Report, presented out of context, to ascertain the preemptive intent of Congress. *See Harrison*, 446 U.S. at 592 ("it would be a strange canon of statutory construction that would require Congress to state in committee reports ... that which is obvious on the face of a statute."). Instead, the correct and "common sense" use of legislative history in preemption analysis is to incorporate "additional information rather than ignoring it." *Wisconsin Pub. Intervenor*, 501 U.S. at 611; *see also United States v. Fisher*, 6 U.S. 358, 386 (1805) (Marshall, J.) ("where the mind labours to discover the design of the legislature, it seizes every thing from which aid can be derived."); *California Federal Savings & Loan Association v. Guerra*, 479 U.S. 272, 284 (1987) (when examining a statute's language "against the background of its legislative history" it must be done in "historical context.").

Petitioners ignore that the purpose and objective of Congress was to provide a statutory scheme of employer sanctions as a means "to curtail[ ] future illegal immigration[.]" H.R. Rep. No. 99-682(I), at 46. The congressional record unequivocally reflects this historical fact. When IRCA was presented to the Senate in 1985, its chief architect Senator Alan K. Simpson stated, "We all know that employer sanctions [are] the very key to immigration reform." 131 Cong. Rec. 23718 (1985). Senator Simpson repeated this formulation of the purpose and objective of

employer sanctions after the publication of the House Report, stating that there cannot be "effective control of our borders without having employer sanctions[.]" 132 Cong. Rec. 33212 (1986).

Senator Steve Symms supported IRCA for the same reason, stating, "[E]mployer sanctions provisions are an attempt to halt illegal immigration into the United States" by transferring part of the "responsibility for law enforcement from the Government over to the private sector." 131 Cong. Rec. 23718 (1985). Some members of Congress did express concerns that IRCA's employer sanction provisions would unfairly shift the responsibility "to the private sector" and "hamper economic activity and growth[.]" *Id.* at 23719.[2] However, these concerns were the viewpoint of the minority voting against IRCA.

The majority did not view IRCA's employer sanctions as an unreasonable burden on employers, as Petitioners now claim. Pet. Br. 8, 18, 43. As Senator Mack Mattingly stated, "The well-being of our citizens requires ... a serious effort to gain control of our borders," and "employer sanctions will ... contribute to this control." 131 Cong. Rec. 24306 (1985). Attorney General Edwin Meese III made a similar statement:

> As long as the American job market remains open to them, illegal aliens will continue

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[2] *See also* 132 Cong. Rec. 32221, 33242 (1986) (statements of Sen. McClure).

> illegal entry, smuggling, fraudulent visas ... We continue to support effective methods to require employers to share in the responsibility to help solve this problem.

H.R. Rep. No. 99-682(I), at 103. The record is emphatic that Congress drafted IRCA's employer sanctions to "drop significantly" the "availability of American jobs to illegal workers[.]" 131 Cong. Rec. 24308 (1985) (statement of Sen. Hatfield). Members of Congress viewed IRCA's employer sanctions scheme as the "humane approach" in "solving our immigration problems by placing the emphasis on penalizing those employers who would knowingly hire illegal aliens[.]" *Id.* at 24316 (statement of Sen. Dole); *see also id.* at 23718 (statement of Sen. Simpson) (without employer sanctions there "is no immigration reform, at least on the humane basis that Senator Kennedy and I have tried to do it").

In pursuing this "humane approach,"[3] Congress did seek to "balance" multiple interests. As Senator Bob Dole stated, "[IRCA] is well-constructed and carefully balanced legislation – the product of years of discussion and debate over a highly complex, emotional issue." *Id.* at 24316. However, Petitioners have mischaracterized this "balance" by excluding State participation as a factor, except in narrow licensing circumstances. Pet. Br. 24-28. Not only does the plain

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[3] The alternative, inhumane approach, would have required direct enforcement at the border and in the interior. *See* Sen. Rep. No. 99-132, at 7-8.

meaning of 8 U.S.C. § 1324a(h)(2) conflict with Petitioners' interpretation of IRCA's "balance," but a statement by IRCA's chief architect, Senator Simpson, expressly refutes it:

> I want to say to my colleagues that this bill ... shows that such a subject [like immigration reform] can be dealt with in a way which balances the very real needs of many interest groups in this country – business, labor, *heavily impacted State and local governments*, and many others – keeping paramount the fundamental obligation of all Members of Congress, to serve the interests of the American people as a whole and their descendents ... [IRCA] contains most importantly, provisions intended to reduce the problem of illegal immigration. I say "most importantly" since the potential benefits and protections ... will not be available in practice if those statutory standards cannot be enforced.

131 Cong. Rec. 24318 (1985) (emphasis added). The inclusion of the interest of "State and local governments" is reflected in the text of 8 U.S.C. § 1324a(h)(2). It expressly permits "any State or local law" that imposes employer sanctions "through licensing and similar laws[.]" 8 U.S.C. § 1324a(h)(2). Neither Petitioners nor their accompanying *amici* have produced any legislative history contemporaneous

with the enactment of IRCA[4] to refute the conclusion that the States were an important part of the "balance" Congress struck in 1986.

Moreover, Petitioners' reading of 8 U.S.C. § 1324a(h)(2) contradicts IRCA's purpose and objective. Senator Simpson drafted IRCA so that its "statutory standards" – "intended to reduce the problem of illegal immigration" – would "be enforced." 131 Cong. Rec. 24318 (1985). Contrary to Petitioners' belief, Part I of House Report 99-682 contains nothing that contradicts this purpose and objective. *Compare* Pet. Br. 6-8, 17, 29-30, 34, 43-44, *with* H.R. Rep. No. 99-682(I), at 45-47, 56, 58, 68.

In fact, during the report's debate, members of both the House and Senate repeated that the main purpose and objective of IRCA was to establish a scheme for employer sanctions to deter illegal immigration and gain control of the border. For example,

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[4] The majority of the *amici curiae* briefs do not even touch upon the congressional debates concerning IRCA's employer sanctions scheme or House Report 99-682. *See* Br. Of Amicus Curiae United States at 16-23; Br. Of Amici Curiae Representative Mazzoli et al., at 8-13; Br. Of Amici Curiae National Immigration Justice Center et al., at 7-17; Br. Of Amicus Curiae Service Employers International Union at 5-11. Only the *amici curiae* brief by Business Organizations made an attempt to quote or cite to the Congressional Record. *See* Br. Of Amicus Curiae Service Employers International Union at 6-10. However, not once does that brief quote or cite to the debates touching upon IRCA's provisions, the House Report, or any debates from the 99th Congress. Instead, the brief by Business Organizations cites and quotes the debates of the 98th Congress. *Id.*

Representative Peter W. Rodino, Chairman of the Judiciary Committee, stated the conference report was "fair and balanced," clarifying his view that IRCA's "sanctions provisions are fair to decent and honest employers, [and] at the same time, ensure that repeat offenders will be subject to strong civil and criminal penalties." 132 Cong. Rec. 31631 (1986); *see also* H.R. Rep. No. 99-682(I), at 107 (statement of Rep. Rodino). Representative John Bryant supported the conference report, stating, "Strong employer sanctions are absolutely essential to turn off the jobs magnet that encourages people to enter the United States illegally." 132 Cong. Rec. 31640 (1986). Representative Charles Schumer supported the employer sanction scheme because "[u]ntil and unless employers are threatened with ... penalties, there is little hope that the United States will be able to stem the flow of illegals pouring into the United States." *Id.* at 31645. Even Representative Romano L. Mazzoli, who has joined an *amici curiae* brief in support of Petitioners,[5] stated that IRCA's employer sanction scheme has "universal application" to "bring some order and sense to our immigration policy by regaining control of our borders[.]"[6] *Id.* at 31633.

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[5] The *amici curiae* brief joined by Representative Romano L. Mazzoli, Senator Arlen Specter, and Representative Howard L. Berman does not once cite to or quote the 1985-86 House or Senate debates concerning IRCA. *See generally* Br. Of Amici Curiae Representative Mazzoli et al.

[6] *See also* 132 Cong. Rec. 31643 (1986) (statement of Rep. Lungren) ("We have retained employer sanctions. It is an

(Continued on following page)

The Senate debate on the House Report reveals more of the same.[7] Senator Howard M. Metzenbaum supported the conference report, stating:

> For once, we will have employer sanctions in place, and they are tough employer sanctions. Those sanctions are a key part of the bill. Without it, I do not think the bill would be worth passing. But you cannot have a policy of enforcing immigration control ... unless you have some control over those employers that sign the paychecks for the illegal immigrants[.]

Id. at 32412. IRCA's chief architect Senator Simpson also concurred with the conference report, stating "as long as you have employer sanctions" there will be those "who are going to oppose it." *Id.* at 33212. Responding to the minority opposition, Simpson emphasized that IRCA's employer sanctions scheme was "absolutely essential." *Id.* Many Senators followed Simpson's lead. Senator Pete Wilson knew that the minority viewed IRCA's scheme as "distasteful," but felt that it offered "the only device by which we may hope to reverse this tide" of illegal immigration. *Id.* at 33225. Meanwhile, Senator Alan Cranston

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important part of this bill; it is an indelible part of this bill."); *id.* at 31644 (statement of Rep. Bustamante) ("sanctions will keep a magnet from attracting these people here").

[7] Once the House Report was approved by the House of Representatives, it was sent to the Senate for approval. *See* 132 Cong. Rec. 33212-45 (1986). The report was approved by the Senate on October 17, 1986. *Id.* at 33245 (63 yeas, 24 nays).

stated that while IRCA left "unresolved or unfinished some major immigration related problems," he knew that its employer sanction scheme was viewed by the Senate as the "crux" and "key" to "deterring illegal immigration." *Id.* at 33234 (emphasis added).

III. THE CONFORMING AMENDMENTS TO AWPA DID NOT NARROW IRCA'S PURPOSE AND OBJECTIVE

When Senator Simpson proposed IRCA's employer sanctions scheme, he included conforming amendments to the Migrant and Seasonal Agricultural Worker Protection Act (AWPA). *See* Sen. Res. 1200, 99th Cong. (1985) (enacted); 29 U.S.C. §§ 1801-1872. These amendments did not seek to conform IRCA's employer sanctions scheme according to the preexisting AWPA. Instead, the conforming amendments merely incorporated IRCA's employer sanctions scheme as a means to continue providing greater statutory protections to the farm labor industry. *See* Sen. Rep. No. 99-132, at 79-82. The plain reading of 29 U.S.C. § 1813 confirms this construction.

Conversely, Petitioners assert that the AWPA conforming amendments require this Court to read the 8 U.S.C. § 1324a(h)(2) savings clause narrowly. Pet. Br. 17, 26-34. Petitioners' interpretation of IRCA's statutory language and legislative history fails for two reasons. First, the language of 8 U.S.C. §§ 1324a and 1324b is structurally and statutorily dissimilar to AWPA. *Compare* 8 U.S.C. §§ 1324a,

1324b, *with* 29 U.S.C. §§1801-1872; *Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75, 79 (1998). Second, and more importantly, the congressional debates reveal that the majority who voted in favor of IRCA sought to retain the greater statutory protections for the farm labor industry, with its migrant and seasonal agriculture workforce, under a distinct statutory scheme. This was part of the "balance" Congress struck when enacting IRCA.[8]

Indeed, the purpose and objective of the conforming amendments to AWPA were akin to IRCA's employer sanctions scheme in that both sought to control unlawful immigration. However, when enacting IRCA, members of Congress intended to maintain greater protections for the farm labor industry in regards to employer sanctions. Representative Edward R. Roybal voted against IRCA on this very point, stating:

> [Congress] voted for immigration reform with sanctions, but they did not. What they voted for is a farm labor bill, a bill that is designed to provide cheap labor for the farmers and growers of this country, a bill that

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[8] 131 Cong. Rec. 24310 (1985) (statement of Sen. Bingaman) ("I believe S. 1200 does provide some flexibility to address the needs of the perishable crop industry"); *id.* (statement of Sen. Bingaman) ("Minority Americans, farmers, business owners and employers all have a stake in this legislation and I have tried to *balance* their concerns.")

> exempts them from sanctions, while it legalizes the men that work for them.

132 Cong. Rec. 31637 (1986) (debate over Part I of House Report 99-682). Roybal's argument did not sway the majority from maintaining the differing protections, i.e. conforming amendments, for the farm labor industry. Representing the majority voice, Representative Rodino responded to Roybal's objection, stating:

> [Previous bills] sought to reform our immigration laws on the backs of American farmworkers ... This time we have done it a different way. We have finally dealt with the asserted needs of agriculture in a fashion that protects the legal status and the rights and the dignity of farm workers, in a way that we can all be proud of[.]

Id. To paraphrase, the conforming amendments merely incorporated IRCA's newly created employer sanctions scheme into AWPA. Neither the text of AWPA nor IRCA's legislative history supports Petitioners and their accompanying *amici*'s argument that 8 U.S.C. § 1324a(h)(2)'s savings clause is somehow restricted by AWPA. Petitioners and their accompanying *amici* rely on a flawed reading of IRCA's amendments to the AWPA, and do not base their interpretation upon any substantiated or contemporaneous legislative history.

In fact, neither Petitioners nor their accompanying *amici* provide any evidence from the IRCA debates that supports their stance.[9] The single excerpt from the contemporaneous legislative history that they do incorporate, Part I of House Report 99-682, they present out of context. Petitioners rely solely on the phrases "fitness to do business laws" and "farm labor contracts" in making their argument that the AWPA limited IRCA's savings clause. Pet. Br. 17, 26, 32-34, 36. However, Petitioners' argument ignores the context of the phrase "such as" in the conference report. H.R. Rep. No. 99-682(I), at 58. It shows that Congress was giving two examples of State laws that it did not intend to preempt, rather than an exhaustive list. *Id.* ("Further, the Committee does not intend to preempt licensing or "fitness to do business laws," such as state farm labor contractor laws or forestry laws").

Petitioners also ignore the term "further" in the House Report, which illustrates that the explanation in the second sentence is in addition to what Congress intended in the first sentence. The first sentence broadly discusses "lawful state and local processes concerning the suspension, revocation, or refusal to reissue a license to a person who has been found to have violated this section." H.R. Rep. No.

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[9] *See* Pet. Br. 17, 26-34; Br. Of Amicus Curiae United States at 17-23; Br. Of Amici Curiae Representative Mazzoli et al., at 9-12; Br. Of Amici Curiae National Immigration Justice Center et al., at 7-17.

99-682(I), at 58. Nothing in this first sentence demonstrates that Congress sought to limit the business licensing exception to the narrow category of "farm labor contracts," as Petitioners advocate.

IV. IRCA'S ANTI-DISCRIMINATION PROTECTIONS DO NOT LIMIT OR NARROW STATE AUTHORITY TO IMPOSE EMPLOYER SANCTIONS "THROUGH LICENSING AND SIMILAR LAWS"

In addition to providing conforming amendments to AWPA, IRCA included anti-discrimination provisions to minimize any potential discrimination based upon alienage or citizenship. These amendments were not intended to "balance" IRCA by limiting or narrowing the authority of State and local governments to adopt employer sanctions in accordance with 8 U.S.C. § 1324a(h)(2). Instead, Congress included them as a contingency, in case widespread abuse was to occur as a result of employer sanctions. The legislative history reveals that IRCA's greatest anti-discrimination protection, and what "balanced" the employer sanctions scheme, was the requirement that they be "uniformly applied to all employers regardless of the number of employees." H.R. Rep. No. 99-682(I), at 56. Congress felt that the universal and equal application of the employer sanctions scheme "would be least disruptive to the American businessman and also minimize the possibility of employment discrimination." *Id.*

Congress did not believe "wholesale discrimination" would necessarily result because of IRCA's employer sanctions scheme, noting that the "GAO's recent study of sanction laws of other countries did not document such discriminatory impacts." *Id.* at 68. Nevertheless, the anti-discrimination provisions were incorporated as a contingent corrective measure, should "widespread discrimination" actually occur. These anti-discrimination provisions gave Congress the statutory authority to sunset employer sanctions should "widespread discrimination" occur, and also served as a deterrent, by "provid[ing] substantial protections against discrimination in the form of a uniform verification process for all new hires[.]" *Id.*

From the very outset, Senator Simpson informed the Senate that despite concerns that IRCA "will cause some employers to discriminate on the bases of national origin against certain U.S. citizens or aliens authorized to work in the United States," there was "[n]o convincing evidence or argument ... that such discrimination will occur, and the evidence that is available indicates that it would not." 131 Cong. Rec. 23317 (1985); *see also* Sen. Rep. No. 99-132, at 9. Simpson stated that members of Congress would hear hostile arguments concerning prospective discrimination "based on alienage," but assured them that Senator Ted Kennedy's anti-discrimination amendment would allow Congress to swiftly correct any deficiencies should "widespread discrimination" ever actually occur. 131 Cong. Rec. 23317-18 (1985);

IRCA § 101(a)(1) (codified at 8 U.S.C. § 1324a(j)(1)(c) (1986)).

Senator Kennedy confirmed Senator Simpson's interpretation of IRCA's anti-discrimination amendment. Kennedy stated he offered his anti-discrimination amendment because employer sanctions "might – I stress the word "might" – result in discrimination[.]" 131 Cong. Rec. 23320 (1985); *see also id.* at 23717 (statement of Sen. Kennedy) ("I stress the word "might," because we really don't know, and it is certainly not intended or anticipated by the sponsors of this legislation."). In particular, the amendment required the "General Accounting Office (GAO) [to] undertake an independent study" of the implementation of the employer sanction program, and provided Congress with the statutory vehicle to "sunset" employers sanctions "after 3 years, if the GAO finds that employer sanctions has resulted in a "widespread pattern of discrimination." *Id.* at 23321; IRCA § 101(a)(1) (codified at 8 U.S.C. § 1324a(j)(1)(c) (1986)). In other words, Kennedy's anti-discrimination amendment did not seek to narrow or limit IRCA's employer sanctions scheme. It merely sought to "force Congress to face the issue of discrimination squarely, *if it develops*." 131 Cong. Rec. 23321 (1985) (emphasis added); *see also id.* at 23717 (statement of Sen. Kennedy) (assuring "that Congress will act to rectify employer sanctions if a widespread pattern of job discrimination should develop").

Representative Barney Frank also implemented an anti-discrimination amendment that provided

protections against employers who discriminated on the basis of alienage or citizenship. *See* 8 U.S.C. § 1324b(a). The Frank Amendment did not limit or narrow State and local employer sanctions "through licensing or similar laws." Instead, the Frank Amendment sought to "prevent any discrimination ... by employers who are subject to sanctions for hiring illegal aliens." 132 Cong. Rec. 33237 (1986) (statement of Sen. Levin). Representative Rodino confirmed that this was the purpose of the Frank Amendment:

> [The Frank Amendment was] included ... to allay [many Hispanic organizations] concerns and to provide an immediate and effective remedy should discrimination occur ... it is based upon anticipated discrimination, rather than a historical pattern of past discrimination. Nevertheless, we included this provision to meet the concerns expressed about sanctions[.]

Id. at 31632; *see also id.* at 33223 (statement of Sen. Bingaman) (the civil rights provisions "protects against possible abuse."). The record thus indicates that Congress did not include these anti-discrimination amendments based on evidence that widespread discrimination would occur, or to minimize State and local employer sanctions "through licensing and similar laws." Congress included IRCA's anti-discrimination amendments to reassure powerful interest groups that, *should* their asserted fears of pervasive discrimination ever materialize, a remedy would be

available. Neither Representative Rodino nor any other member of the House of Representatives ever stated or suggested that IRCA's anti-discrimination provisions were intended to limit a State and local governments' authority to utilize sanctions "through licensing and similar laws." If anything, Part I of the House Report confirms that Congress included IRCA's anti-discrimination provisions as a contingency:

> The Committee does not share the view that wholesale employment discrimination will necessarily result from the enactment of sanctions ... Nevertheless, the Committee does believe that every effort must be taken to minimize this *potentiality* of discrimination.

H.R. Rep. No. 99-682(I), at 68 (emphasis added). Petitioners ignore the legislative record and materially mischaracterize IRCA's anti-discrimination provisions as providing a delicate "balance" that precludes State and local governments from imposing any further burdens on employers "through licensing and similar laws." *See* Pet. Br. 6-8, 18, 43-45; 8 U.S.C. § 1324a(h)(2). Petitioners assert the Arizona statute "upsets the balance" "struck by Congress ... in IRCA's detailed administrative scheme for investigating, adjudicating, and sanctioning unauthorized worker violations, with corresponding anti-discrimination protections[.]" Pet. Br. 18. In particular, Petitioners contend congressional concerns over employment discrimination are proof that Congress intended 8 U.S.C. § 1324a(h)(2)'s savings clause to be applied

narrowly, and that State and local employer sanctions "through licensing and similar laws" should not further burden employers or prospective employees. Pet. Br. 6-8, 43-45.

For support, Petitioners rely entirely on Part I of House Report 99-682, which states: "The antidiscrimination provisions of this bill are a complement to the sanctions provisions, and must be considered in that context." Pet. Br. 45 (citing H.R. Rep. No. 99-682(I), at 49, 68) (emphasis added). Indeed, the anti-discrimination provisions did *complement* IRCA's employer sanctions provisions; but not in the way Petitioners suggest. The anti-discrimination provisions were put in place as a protection to *complement* employer sanctions *should* employment discrimination occur – not as a vehicle to narrow or limit State and local governments from imposing employer sanctions "through licensing and similar laws."

In other words, IRCA's legislative record reveals that Petitioners' historical characterization of IRCA's anti-discrimination provisions is false. The "balance" that Congress intended within IRCA's statutory scheme was not to limit or narrow the scope of "any State or local law" that imposes sanctions "through licensing and similar laws[.]" 8 U.S.C. § 1324a(h)(2). The anti-discrimination "balance" struck was the requirement that employer sanctions – whether they be federal, State, or local – are to be "uniformly applied to all employers regardless of the number of employees." H.R. Rep. No. 99-682(I), at 56. It was this universal and uniform application that would

"minimize the possibility of employment discrimination." *Id.*; *see also* Sen. Rep. No. 99-132, at 9 (the "employer is protected by the verification provision and will have no reason to discriminate."); 132 Cong. Rec. 31634 (1986) (statement of Rep. Mazzoli) ("Universal and mandatory verification of documents is ... required").

The statements of IRCA's chief architect, Senator Simpson, confirm that universal application to all employers was the most important anti-discrimination provision. Responding to concerns that repeat violators will never "hire anybody again who looks foreign," Simpson stated:

> We are asking here for the citizens of America and noncitizens and those who are authorized to work to present a document ... [The document requirement] says you are legal to work and that document is not intrusive ... It is presented at the time of new hire employment and it is presented by people who "look foreign" and by bald Anglo skinny guys like me, too. Anything else and you would truly have discrimination. That is the issue. I have been through that one plenty of times, and it is extraordinary to me to think that the issue of employers being the policemen of the country, that one went out the window a long time ago. If we do not ask employers of America to handle our withholding tax, who would? ... We have penalties against those employers who choose not

> to do that. That is what we are talking about.

132 Cong. Rec. 33223 (1986); *see also* H.R. Rep. No. 99-682(I), at 45-46.

V. ARIZONA'S LICENSING SCHEME IS NOT PREEMPTED BECAUSE IT COMPORTS WITH IRCA'S PURPOSE AND OBJECTIVE

When Arizona enacted the Legal Arizona Workers Act in 2007, it did so with the purpose and objective of discouraging "the further flow of illegal immigration through our borders." J.A. 397; *see also* Ariz. Rev. Stat. §§ 23-211 to 214. This purpose and objective is "consistent" with what Congress intended. IRCA sought to control illegal immigration and the border through employer sanctions, leaving to the States and local government the authority to enact analogous legislation "through licensing and similar laws." *See infra* pp. 7-17; *Locke*, 529 U.S. at 115 (for preemption the "appropriate inquiry still remains whether the purposes and objectives of the federal statutes, including the intent to establish a workable, uniform system, are *consistent* with concurrent state regulation.") (emphasis added); 8 U.S.C. § 1324a(h)(2).

Arizona's employer licensing sanctions work in harmony with IRCA's purpose and objective in that they provide a means to suspend or revoke the licenses of employers that "knowingly" or "intentionally" employ "an unauthorized alien" in accordance with the verification responsibility of the executive

branch created by 8 U.S.C. § 1373(c). Ariz. Rev. Stat. §§ 23-212(A), 23-212.01(A).

Petitioners assert that Arizona's licensing scheme conflicts with IRCA's purpose of balancing "multiple, sometimes competing, objectives," including "deterring illegal immigration, protecting applicants from discrimination, accommodating privacy concerns, and minimizing burdens on employers." Pet. Br. 2. In other words, Petitioners claim that the Arizona statute disrupts IRCA's balance and "fundamental purpose of establishing a national and "uniform" system of regulating alien employment[.]" Pet. Br. 17.

This interpretation cannot survive the presumption against preemption. *See infra* pp. 7-28; *Chicanos Por La Causa, Inc. v. Napolitano*, 558 F.3d 856, 864 (9th Cir. 2009) ("nor [does] the legislative history [of IRCA] support[ ] plaintiffs' position."). IRCA's principal purpose and objective was to deter illegal immigration through the use of employer sanctions. The legislative and historical record conveys that Congress intentionally included vital State and local interests in the "balance" by providing an express licensing exception to utilize employer sanctions. *See infra* pp. 12-14. As Senator Simpson stated before Congress, IRCA's employer sanctions provisions sought to "balance" the "many interest groups in this country," including "business, labor, *heavily impacted State and local governments*, and many others[.]" 131 Cong. Rec. 24318 (1985) (emphasis added).

Petitioners' concerns about discrimination are overstated. They note that the Ninety-Ninth Congress incorporated anti-discrimination provisions in IRCA. Pet. Br. 18, 44-45. However, these modifications were never intended to prevent, narrow, or limit State and local governments from utilizing employer sanctions through "licensing and similar laws." Instead, the record shows that IRCA's anti-discrimination provisions were intended to give Congress the ability to sunset employer sanctions should widespread discrimination occur, *infra* pp. 21-23, and punish employers found to have engaged in discrimination based on alienage or citizenship, *infra* pp. 23-28.

Petitioners overlook IRCA's most important anti-discrimination device – the application of employment authorization verification requirements to all employers regardless of size. *See* H.R. Rep. No. 99-682(I), at 56; 132 Cong. Rec. 33223 (1986). Arizona's licensing scheme similarly applies universally and uniformly applies to all Arizona employers. *See* Ariz. Rev. Stat. §§ 23-211 to 214. To the extent that the Arizona statute is burdensome to employers as Petitioners claim, that burden accurately reflects IRCA's purpose and objective – controlling the borders through the penalty of employer sanctions. *See infra* pp. 7-17.

A. Arizona's Licensing Scheme Is Not Expressly Preempted

It is well-settled that the "purpose of Congress is the ultimate touchstone" in "every pre-emption case," including challenges based on express preemption doctrine. *Medtronic, Inc.*, 518 U.S. at 485 (citations omitted); *see also Wyeth*, 129 S. Ct. at 1194-95. As the legislative history reveals, Arizona's licensing scheme survives express preemption because it works in accordance with IRCA's purpose of deterring unlawful immigration through the use of employer sanctions. *See infra* pp. 7-28; *see also* Res. Br. 30-43.

All appellate courts that have considered the statutory language of 1324a(h)(2)'s savings clause agree that it should be interpreted according to its plain meaning, and that it does not expressly preempt State or local licensing laws, like Arizona's, that fall within this definition. *See Lozano v. Hazelton*, 2010 U.S. App. LEXIS 18835, at 99-109 (3d Cir. 2010); *Chicanos Por La Causa, Inc.*, at 863-64; *COC v. Edmondson*, 594 F.3d 742, 765-66 (10th Cir. 2010).

This Court has held that when Congress does not define the terms in a statutory scheme, the terms are usually ascribed their "ordinary or natural meaning." *Fed. Deposit Ins. Corp. v. Meyer*, 510 U.S. 471, 476 (1994). Given that Congress did not expressly define the terms "licensing and similar laws," the text of 8 U.S.C. § 1324a(h)(2) should be interpreted according to its plain meaning and save from preemption any State or local licensing laws addressing the

employment of unauthorized aliens. *Lozano*, 2010 U.S. App. LEXIS 18835, at 103. Arizona's licensing scheme easily fits within the "ordinary or natural meaning" of the term "license." *Fed. Deposit Ins. Corp.*, 510 U.S. at 476. *Merriam-Webster's Dictionary* defines a license as "a permission granted by competent authority to engage in a business or occupation or in an activity otherwise unlawful." MERRIAM-WEBSTER'S DICTIONARY (2010), *available at* http://www.merriam-webster.com/dictionary/license. Similarly, *Black's Law Dictionary* defines a license as "a permission, usually revocable, to commit some act that would otherwise be unlawful." BLACK'S LAW DICTIONARY (8th ed. 2004).

Here, Arizona's statutory scheme simply revokes the business licenses or articles of incorporation of employers who employ unauthorized aliens. *See* Ariz. Rev. Stat. §§ 23-211 to 214. Despite Petitioners' claims to the contrary, business licenses and articles of incorporation fall within the plain definition of a "license," and when such statutory language is plain and unambiguous, "the sole function of the courts ... is to enforce it according to its terms." *Lamie v. United States Tr.*, 540 U.S. 526, 534 (2004). The fact that Petitioners offer a plausible alternative reading of 8 U.S.C. § 1324a(h)(2) is not enough to overcome the presumption against preemption, as the Court must "accept the reading that disfavors pre-emption." *Altria Group, Inc.*, 129 S. Ct. at 543 (quoting *Bates*, 544 U.S. at 449); *United States v. Bass*, 404 U.S. 336, 349 (1971) ("unless Congress conveys its purpose

clearly, it will not be deemed to have significantly changed the federal-state balance.").

B. Arizona's Licensing Scheme Is Not Preempted By Implication Because It Supports IRCA's Purpose and Objective

When a State or local statute is not expressly preempted by federal law, the question that remains is whether the State or local statute is impliedly preempted. As with express preemption, the cornerstone for implied preemption analysis is congressional purpose. *Altria Group, Inc.*, 129 S. Ct. at 543. It requires that the Court ascertain "a fair understanding of congressional purpose," *Cipollone*, 505 U.S. at 530 n.27, as "revealed not only in the text, but through the reviewing court's reasoned understanding of the way in which Congress intended the statute and its surrounding regulatory scheme to affect business, consumers, and the law." *Medtronic, Inc.*, 518 U.S. at 486. It also requires the Court to work under the presumption that the traditional "powers of the States [are] not to be superseded by [federal statute] unless that was the clear and manifest purpose of Congress." *Rice*, 331 U.S. at 230. This presumption applies with "particular force" where "Congress has 'legislated ... in a field which the States have traditionally occupied,'" namely licensing schemes and employment. *Wyeth*, 129 S. Ct. at 1194.

There are two types of implied preemption – implied field preemption and implied conflict preemption. Implied field preemption occurs when State or local governments attempt regulation in a field which Congress has implied an intent to exclusively occupy. *English v. General Electric Co.*, 496 U.S. 72, 79 (1990).

Petitioners do not claim that IRCA is "field preempted," nor could they, given that Congress has expressly allowed States to participate in ensuring that employers do not employ unauthorized aliens "through licensing and similar laws." 8 U.S.C. § 1324a(h)(2). Instead, Petitioners argue that the statute is "conflict preempted," which occurs when it is either "impossible ... to comply with both state and federal law," *Geier v. American Honda Motor Co.*, 529 U.S. 861, 873 (2000), or where State law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress," *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941).

Petitioners do not claim that it is "impossible" to comply with both federal law and Arizona's licensing scheme. *See* Pet. Br. 37-44. Instead, Petitioners claim that Arizona's licensing scheme conflicts with IRCA's employer sanctions scheme in that it "disrupt[s] the careful balance that Congress struck among competing interests when it enacted IRCA." *Id.* at 37. In making this argument, Petitioners assert that IRCA left no room for the States to adopt "alternate investigatory and adjudicatory systems" for employer sanctions through "licensing and similar laws" such as

Arizona's licensing scheme. *Id.* at 39. Petitioners further assert Arizona's scheme upsets IRCA's policy objectives and balance in that it does not minimize burdens on employers, could potentially "cause employers to discriminate against prospective employees," and applies "a different system, with different adjudicatory standards and different penalties." *Id.* at 42-46.

These implied conflict preemption arguments are without merit, for Petitioners misstate the purpose and objective of Congress in enacting IRCA; the deterrence of illegal immigration through the use of employer sanctions. *See infra* pp. 7-17. More importantly, the legislative history of IRCA does not provide sufficient evidence of a *clear and manifest* preemptive purpose to bar State and local governments from prescribing employer sanctions through "licensing and similar laws." *See infra* pp. 7-28. Even if Petitioners or their *amici* had been able to identify some legislative history supporting their preemption claims, it is insufficient to defeat the presumption. *Nixon*, 541 U.S. at 141; *Mortier*, 501 U.S. at 611-12.

1. Arizona's Licensing Scheme Works In Harmony With IRCA

When applying conflict preemption to State regulatory schemes the Court will determine whether the State scheme is consistent with the purposes and objectives of the federal scheme, *Locke*, 529 U.S. at 115, and whether "*both* [the] state and federal

regulatory schemes may operate with some degree of harmony," *Northwest Central Pipeline Corp.*, 489 U.S. at 515 n.12. Petitioners' claim, that Arizona's licensing scheme disrupts IRCA's balance by adopting "alternate investigatory and adjudicatory systems" for "licensing and similar laws," is not sufficient to rebut the presumption against preemption. *Compare* Pet. Br. 37-42, *with Northwest Central Pipeline Corp.*, 489 U.S. at 519-22. Conflict preemption analysis does not solely rest on whether a "state law impacts on matters within [federal] control[.]" *Northwest Central Pipeline Corp.*, 489 U.S. at 518. Instead, the doctrine of implied conflict preemption assumes the State law impacts federal law in some manner, and presumes that a State law or scheme will be saved from conflict preemption. *Id.*

This presumption against preemption also applies when Congress includes a savings clause. A savings clause "reflects a congressional determination that occasional nonuniformity is a small price to pay" in implementing the purposes and objectives of a federal statutory scheme. *Geier*, 529 U.S. at 871. In other words, for conflict preemption analysis purposes, the inclusion of a savings clause infers that "[u]nless clear damage to federal goals [will] result" the Court should not preempt State laws that support Congress's purpose and objective. *Northwest Central Pipeline Corp.*, 489 U.S. at 522.

In this case, IRCA's legislative history shows that Arizona's licensing scheme works within the purposes and objectives of IRCA. *See infra* pp. 7-17. The only

question that remains is whether Arizona's licensing scheme fails to "operate with some degree of harmony" with IRCA. *Northwest Central Pipeline Corp.*, 489 U.S. at 515 n.12.

Indeed, there may exist a State licensing scheme that is "so extensive and disruptive" as to "give way to federal pre-emption." *Id.* at 518. However, the Arizona licensing scheme is not one of them. The Arizona scheme works in harmony with the purposes and objectives of IRCA. It utilizes federal tools such as relying on federal verification of work authorization status, applies uniformly to all employers in States, and provides employers with good faith defenses. For example, Ariz. Rev. Stat. §§ 23-212(B) and 23-212.01(B) both require that all complaints investigated by the "attorney general or county attorney" to be verified pursuant to 8 U.S.C. § 1373(c). In contrast to Petitioners' claims that Arizona's licensing scheme does not offer anti-discrimination protections or protect employers, Arizona's licensing scheme stipulates penalties for "false and frivolous" complaints, and provides defenses for employers, including an "affirmative defense," to employers that comply with 8 U.S.C. § 1324a(b). *See* Ariz. Rev. Stat. §§ 23-212(C), (I)-(K); Ariz. Rev. Stat. § 23-212.01(C), (I)-(K); *see also* Res. Br. 44-58.

Arizona's utilization of the E-verify program shows that Arizona's licensing scheme is working in "harmony" with the federal laws. Ariz. Rev. Stat. § 23-214. In addition to the I-9 system, Congress created the E-verify program as a federal tool for employers

to verify, at the time of hire, whether an employee is lawfully authorized to work. *See* Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), Pub. L. No. 104-208, 110 Stat. 3009 (1996); Basic Pilot Program Extension and Expansion Act of 2003, Pub. L. No. 108-156, 117 Stat. 1944 (2003). The fact that E-verify is not mandated at the federal level for all employers, does not preempt States from mandating its use through their historic police powers. *See* Res. Br. 58-67; *see also Gray v. Valley Park*, 2008 U.S. Dist. LEXIS 7238, at 57-58 (E.D. Mo. 2008).

2. Arizona's Licensing Scheme Does Not Stand as an Obstacle to IRCA's Balance

In obstacle conflict preemption cases the Court's "primary function is to determine whether" the State law at issue "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Hines*, 312 U.S. at 67. This legal principle maintains the "appropriate state/federal balance," places Congress on notice that it must "speak clearly" when exercising its authority, and "prevents federal judges from running amok" with the "potentially boundless doctrine of conflict pre-emption based on frustration of purposes[.]" *Geier*, 529 U.S. at 907 (Stevens, J., dissenting). It is a principle that "must be applied sensitively ... so as to prevent the diminution of the role of Congress reserved to the States while at the same time

preserving the federal role." *Northwest Central Pipeline Corp.*, 489 U.S. at 516.

Obstacle preemption turns on whether the goals of the federal statute are frustrated by the effect of the state law." *Pharm. Research & Mfrs. of Am. v. Wash*, 538 U.S. 644, 679 (2003) (Thomas, J., concurring). Nothing in the statutory text (or in the legislative history) demonstrates that Congress intended to preempt laws such as Arizona's licensing scheme.

Petitioners assert that obstacle conflict preemption should require this Court to preempt the Arizona law because Congress "balanced" multiple objectives in passing IRCA. Pet. Br. 44-46. While obstacle conflict preemption requires an inquiry into the purposes underlying a federal statute, the Court should proceed cautiously so as to not upset the "appropriate state/federal balance." *Geier*, 529 U.S. at 907 (Stevens, J., dissenting).[10] Properly applied, obstacle conflict preemption analysis requires the Court to examine whether the "state regulation is consistent with the structure and purpose of the statute as a whole," *Gade v. National Solid Waste Mgmt. Ass'n*,

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[10] *See also Northwest Central Pipeline Corp.*, 489 U.S. at 516 ("conflict preemption analysis must be applied sensitively ... so as to prevent the diminution of the role of Congress reserved to the States while at the same time preserving the federal role."); *Wyeth*, 129 S. Ct. at 1208 (Thomas, J., dissenting) (cautioning that obstacle preemption should not turn into a "freewheeling judicial inquiry into whether a state statute is in tension with federal objectives, but an inquiry into whether the ordinary meanings of state and federal law conflict.").

505 U.S. 88, 98 (1992), as "Congress intended the statute and its surrounding regulatory scheme to affect business, consumers, and the law." *Medtronic, Inc.*, 518 U.S. at 486.

Petitioners' reading of IRCA's history is not consistent with IRCA's structure and purpose as a whole. Petitioners focus on selective excerpts of IRCA's legislative history as constituting Congress's purpose and objective as a whole. They argue that IRCA's purpose was to carefully balance burdens on employers and prevent discrimination, Pet. Br. 42-46, yet ignore that the legislative history reveals that Congress's principal purpose and objective was to establish an employer sanction scheme to control illegal immigration and the border through employer sanctions, leaving to the States and local government the authority to enact analogous legislation "through licensing and similar laws." *See infra* pp. 7-17; 8 U.S.C. § 1324a(h)(2).

Indeed, Congress did "balance" multiple interests, but this balance included State and local interests. *See* 8 U.S.C. § 1324a(h)(2); H.R. Rep. No. 99-682(I), at 58; 131 Cong. Rec. 24318 (1985) (statement of Sen. Simpson). This is why Petitioners' argument fails, for it does not take into account that when Congress includes a savings clause it is assumed that there will be some nonuniformity in the law. *Geier*, 529 U.S. at 871. While nonuniformity results in some friction between the State and federal schemes, this does not necessarily stand as an obstacle to the

"accomplishment and execution of the full purposes and objectives of Congress." *Hines*, 312 U.S. at 67.

CONCLUSION

Based on the legislative history concerning IRCA's purpose and objective, Arizona's licensing scheme is neither expressly nor impliedly preempted, and *amicus* respectfully asks that the Court uphold the decision of the Ninth Circuit.

Respectfully submitted,

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AMICUS CURIAE BRIEF

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IN THE
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CHAMBER OF COMMERCE
OF THE UNITED STATES OF AMERICA, *et al.*,
Petitioners,

v.

MICHAEL B. WHITING, *et al.*,
Respondents.

On Writ of Certiorari
to the United States Court of Appeals
for the Ninth Circuit

BRIEF *AMICI CURIAE* OF REPRESENTATIVE ROMANO L. MAZZOLI, SENATOR ARLEN SPECTER, AND REPRESENTATIVE HOWARD L. BERMAN IN SUPPORT OF PETITIONERS

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INTEREST OF AMICI[1]

Amici, Representative Romano L. Mazzoli, Senator Arlen Specter, and Representative Howard L. Berman are a group of current and former Members of Congress who were directly involved in the drafting and passage of the Immigration Reform and Control Act of 1986 (IRCA), Pub. L. No. 99-603, 100 Stat. 3359.

Representative Romano L. Mazzoli represented Kentucky's Third Congressional District in the United States House of Representatives from 1971 through 1995 as a member of the Democratic Party. He was the co-author and co-sponsor of IRCA, which is also known as the Simpson-Mazzoli Act. For twelve years, Representative Mazzoli served as Chairman of the House of Representatives' Immigration, International Law and Refugees Subcommittee. Representative Mazzoli was a leader on immigration reform throughout his tenure in Congress.

Senator Arlen Specter has represented the Commonwealth of Pennsylvania in the United States Senate since he took his oath of office in 1981.

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1. The parties' letters granting blanket consent for the filing of amicus briefs are on file with the Clerk of this Court. No counsel for a party authored this brief in whole or in part, and no counsel for a party (nor a party itself) made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amici* or their counsel made a monetary contribution to its preparation or submission.

Senator Specter has been a member of the Senate Judiciary Committee since he joined the Senate. Senator Specter voted for the passage of IRCA in 1986 as a member of the Republican Party. He has been an active participant in legislative debates concerning immigration reform for almost thirty years, including cosponsoring the bi-partisan Comprehensive Immigration Reform Act of 2006.

Representative Howard L. Berman has represented California's Twenty-eighth Congressional District in the United States House of Representatives as a member of the Democratic Party since 1983. Representative Berman serves as Vice Chair of the House Judiciary Committee and as a member of the House Subcommittee on Immigration, Citizenship, Refugees, Border Security, and International Law. Representative Berman has co-sponsored immigration reform proposals and took an active role in the debate over immigration reform legislation that culminated in IRCA's passage by testifying in front of various committees, including the Rules Committee and the Subcommittee on Labor Standards. Representative Berman voted in favor of IRCA in 1986.

Amici support the argument of the Petitioners and the United States that IRCA was intended to preempt laws like the Legal Arizona Workers Act, 2010 Ariz. Legis. Serv. Ch. 113 (S.B. 1070) ("the Arizona Law"). *Amici* explain that IRCA was designed to create a uniform federal system to regulate the employment of unauthorized workers, displacing preexisting state laws. Congress included

only a limited exception for licensing laws. Congress did not intend that the licensing exception would authorize laws such as the Arizona Law. Rather, it was intended to be narrow and to apply only where there has first been a finding *under the federal IRCA process* that an employer has violated IRCA. Only in that situation could states and localities penalize employers through suspension or cancellation of their business licenses. Thus, the licensing exception was designed to leave states free to punish violators of IRCA, not to supplant IRCA with their own freestanding regulation of employment practices. In contrast, Arizona's reading of the "licensing" exception would eviscerate the preemption provision, allowing every state and city to pass its own free-standing law addressing employment of undocumented workers, and thus permitting the exception to swallow the rule. For these reasons, *amici* urge the Court to reverse the decision of the Court of Appeals for the Ninth Circuit with instructions to vacate the judgment of the district court.

SUMMARY OF ARGUMENT

Congress enacted IRCA with the knowledge that immigration is a matter of national concern over which Congress has plenary power. Congress was also aware of this Court's ruling in *DeCanas v. Bica*, 424 U.S. 351 (1976), that the Immigration and Nationality Act, as written at the time, did not preempt harmonious state laws imposing sanctions on employers who knowingly hired illegal

immigrants. It was with that knowledge that Congress in IRCA expressly preempted states and localities from imposing their own schemes of sanctions on employers for employing unauthorized workers.

Congress was also mindful of the traditional authority of states and localities to control the licensing of businesses. And Congress was cognizant that states in the past had relied on federal law in adjudicating such licensing decisions. In particular, Congress had in mind that states and localities in the past had predicated licensing decisions on a finding that a company had violated federal law, particularly with respect to farm labor contracting. Accordingly, in order not to tread on states' authority to regulate business licensing, and in order to preserve the schemes that had been utilized in the past and that were predicated on violations of federal law, Congress took care to allow states and localities to restrict, deny, or revoke business licenses based on a violation of IRCA.

Congress did not, however, intend to provide free rein to the states to create new immigration laws penalizing businesses simply by calling those laws "licensing laws." Congress included an exception for state and local licensing laws in order to permit states and localities to impose license-based penalties on businesses for violating IRCA, not for violating new state laws. Congress did not intend for the exception to swallow the rule. An interpretation that leaves the Arizona Law intact does just that, and in so doing, goes well beyond that which

Congress had in mind in carving out a limited exception to its comprehensive federal scheme.

ARGUMENT

I. When Congress Passed IRCA, It Was Aware of Existing State Laws Imposing Employer Sanctions for Violations of State Law and Intended to Preempt Those Laws Expressly.

In enacting IRCA, Congress was not writing on a blank slate. Members of Congress were acutely aware of the preexisting legal landscape, which largely relied on State labor laws to regulate the employment of undocumented workers. Indeed, at the time Congress was considering the national immigration reform, at least 11 different states had labor laws on the books making it illegal for employers to hire unauthorized aliens.[2] *See, e.g.*, H.R. Rep. No. 94-506, at 7 (1975) ("[M]any states have recognized the need for criminal sanctions against employers of illegal aliens."); 130 Cong. Rec. 16,202 (1984) (statement of Rep. Lungren) ("A number of the States of the Union have now on their books employer sanctions, although there has been a question by the courts whether they have jurisdiction to do that because they are looking to the Federal

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[2] *See* Cal. Lab. Code § 2805 (1984); Conn. Gen. Stat. Ann. § 31-51k (1972); Del. Code Ann. tit. 19, § 705 (1977); Fla. Stat. Ann. § 448.09 (1977); Kan. Stat. Ann. § 21-4409 (1977); Me. Rev. Stat. Ann. tit. 26, § 871 (1977); Mass. Gen. Laws Ann. ch. 149, § 19C (1976); Mont. Code Ann. § 41-121 (1977); N.H. Rev. Stat. Ann. § 275-A:4-a (1976); Vt. Stat. Ann. tit. 21, § 444a (1977); Va. Code Ann. § 40.1-11.1 (1977).

Government for some authority, which do have criminal sanctions . . . ."); 130 Cong. Rec. 16,223 (statement of Rep. Richardson) (1984) ("Eleven States have had experience with sanctions . . . ."); 130 Cong. Rec. 16,223 (1984) (statement of Rep. Berman) ("In 1971, California passed an employer sanction law known as the Dixon-Arnett Act. It made it illegal to knowingly employ illegal aliens in California if that employment had an adverse effect on resident workers."); *Immigration Reform: Hearings Before the Subcomm. on Immigration, Refugees, and International Law of the H. Comm. on the Judiciary*, 97th Cong. 1251 (1981) (statement of Roger Conner, Federation for American Immigration Reform); *Illegal Aliens: Hearings Before Subcomm. No. 1 of the H. Comm. on the Judiciary*, pt. 1, 92d Cong. 149-62 (1971) (statement of Hon. Dixon Arnett, California State Assemblyman).

Whether State laws were effective was a matter of serious debate in Congress. Many argued that the states were ineffective in enforcing employer sanctions. *See, e.g.*, 130 Cong. Rec. 16,223 (statement of Rep. Berman) ("We have about a 2-year history in California where that law was enforced and many experiences with it which I think point out the danger of, first, thinking that employer sanctions are the answer to the problem, and, second, thinking there are not a great deal of negative side effects."); 130 Cong. Rec. 16,222 (statement of Rep. Edwards) (stating that there was "no enthusiasm" for enforcing existing State laws imposing employer sanctions); 130 Cong. Rec. 16,223 (statement of Rep. Richardson) ("Eleven States have had experience

with sanctions and the conclusion is that all of them have been unsuccessful.").

In this debate between imposing a uniform scheme of federal employer sanctions versus enforcing then-existing federal and state labor laws and state sanctions, those favoring the federal scheme of employer sanctions prevailed. In June 1986, the House of Representatives voted down Rep. Roybal's amendment to HR 1510—a precursor to HR 3810—which proposed to replace the proposed federal employer sanctions with additional federal funding for enforcement of existing labor laws. In discussing the proposed amendment, Rep. Lungren of California and Rep. Mazzoli of Kentucky pointed out that, even though an amendment could have been offered to improve "labor condition enforcement without knocking out employer sanctions at the same time," such an amendment was never offered: "The fact of the matter is another amendment could have been presented to us which only went to the addition of protection of labor sanctions. . . . We do not have that here. In order to get to that point you have to get rid of the employer sanctions altogether." 130 Cong. Rec. 16,224 (statements of Rep. Lungren & Rep. Mazzoli). The House, by an overwhelming majority, voted down Rep. Roybal's amendment.

Instead, Congress included language that expressly preempted "any State or local law imposing civil or criminal sanctions (other than through licensing and similar laws) upon those who employ, or recruit or refer for a fee for employment, unauthorized aliens." 8 U.S.C. § 1324a(h)(2). The

express preemption provision that appears in IRCA and its predecessor bills was a direct response to this Court's holding in *DeCanas v. Bica*, 424 U.S. 351 (1976), that the federal Immigration and Nationality Act did not preempt harmonious state laws and regulations imposing sanctions on employers who knowingly hired illegal immigrants. That decision almost immediately prompted requests for Congress to pass federal preemption legislation. *See, e.g., Immigration 1976: Hearings on S. 3074 Before the Subcomm. on Immigration & Naturalization of the S. Comm. on the Judiciary*, 94th Cong. 25 (1976) (statement of Leonard F. Chapman, Jr., Commissioner, INS). By including the express preemption provision in the proposed immigration reform bills, Congress thus intended to make it clear that, by enacting federal employer sanctions for knowing hiring of illegal immigrants, Congress intended to preempt state and local laws legislating in the same area. The employer sanctions set forth in IRCA were intended to displace, not supplement, the then-existing system of state laws that sought to serve the same purpose.

II. The Exception in IRCA's Preemption Provision for "Licensing and Similar Laws" Was Not Intended to Permit Laws Like the Legal Arizona Workers Act.

Congress did not intend to allow States to enact their own employer sanctions laws simply by calling them "licensing laws." Indeed, there is no evidence that Congress contemplated anything even remotely

resembling the Arizona Law when it crafted IRCA's preemption provision.

It was not until 1985 that a bill even included the licensing exception. The previous two Senates had passed versions of employer sanctions legislation that included preemption language with no exceptions whatsoever. *See* S. 529, 98th Cong. (1983); S. 2222, 97th Cong. (1982). The licensing exception first appeared in a House bill introduced in 1985, the Comprehensive Immigration Reform and Control Act of 1985. *See* H.R. 1061, 99th Cong. (1985). Subsequently, all immigration reform bills introduced in the 99th Congress that proposed employment sanctions contained the licensing exception that appeared in the version of IRCA that became law.

The context of the congressional debate in which this language was introduced makes clear that it was primarily directed to the industries that were known for hiring undocumented workers—*e.g.*, agricultural and farm contracting—particularly given problems with hiring illegal immigrants in seasonal farming operations. Indeed, this same concern was reflected in Congress's amendment of the Migrant and Seasonal Agriculture Worker Protection Act, Pub. L. No. 97-470, tit. I, 96 Stat. 2588 (1983), codified at 29 U.S.C. §§ 1801 *et seq.*, as part of IRCA; Congress provided in IRCA that farm labor contractors' licenses could be revoked, and farm labor contractors could be sanctioned, upon the finding that they violated the newly enacted IRCA's employer sanctions provisions. *See* 29 U.S.C. §§ 1813(a)(6),

1851(b). Without the licensing exception, states and municipalities would have been preempted from restricting the license of a labor contractor found to have violated IRCA. Congress thus inserted the licensing exception in order to permit States to regulate the licenses of these employers, but only as a consequence of having violated IRCA. The point of the exception was not to give the states free rein to punish employers, but rather to clarify that they could still impose their own licensing-related sanctions for violations of the federal statute.

The same understanding is reflected in the July 16, 1986 Report of the House Committee on the Judiciary recommending the passage of H.R. 3810, H.R. Rep. No. 99-682(I), at 58 (1986), reprinted in 1986 U.S.C.C.A.N. 5649, 5662. There, Congress made clear that the licensing exception in 8 U.S.C. § 1324a(h)(2) requires an underlying violation of federal law. It explained that the penalties established in IRCA were "intended to specifically preempt state or local laws providing civil fines and/or criminal sanctions on the hiring, recruitment or referral of undocumented aliens," with one exception:

> They are not intended to preempt or prevent lawful state or local processes concerning the suspension, revocation or refusal to re-issue a license to any person *who has been found to have violated the sanctions provisions in this legislation.*

H.R. Rep. No. 99-682(I), at 58, reprinted in 1986 U.S.C.C.A.N. at 5662 (emphasis added). Congress

thus limited the exception to permit states to utilize licensing regulation to punish employers who violated "this legislation," *i.e.*, IRCA.

In light of this legislative history, the Arizona Law necessarily falls outside the licensing exception, and is therefore preempted by IRCA. First, the Arizona Law does not suspend, revoke or refuse to reissue a license to any person "who has been found to have violated the sanctions provisions in [IRCA]." *Id.* Rather, it imposes sanctions on a finding of a violation of the Arizona Law, without requiring any finding that the employer violated the sanctions provisions of IRCA.

Second, the Arizona Law goes beyond the limited licensing exception. As shown above, the limited licensing exception contemplated State and local laws that condition the issuance of a license on refraining from hiring, recruiting or referring undocumented aliens. In particular, Congress had in mind state laws regulating the issuance of licenses for farm labor contractors and those engaged in such activities as, for instance, forest tree cutting. *See* H. R. Rep. No. 99-682(I), at 58, reprinted in 1986 U.S.C.C.A.N. at 5662. Congress crafted the exception with the knowledge that an exception ought not swallow the rule. *See, e.g., United States v. Locke*, 529 U.S. 89, 106 (2000) (explaining that the Court does not "give broad effect to saving clauses where doing so would upset the careful regulatory scheme established by federal law"); *McNary v. Haitian Refugee Ctr., Inc.*, 498 U.S. 479, 496 (1991) ("It is presumable that Congress legislates with knowledge

of our basic rules of statutory construction."). The Arizona Law, however, is not a "licensing law." It does not set forth all requirements for issuing and maintaining a farm labor contractor license, or a forest tree cutting license. Rather, it is a State labor law that Congress expressly preempted in IRCA.

In conclusion, Congress enacted IRCA for the express purpose of creating a "uniform[]" system of regulating the employment of unauthorized workers. IRCA § 115. The legislators who crafted the law worked to ensure that it would strike the right balance between strengthening enforcement of the immigration laws, protecting the rights of authorized workers, and avoiding an undue burden on the business community. In light of the substantial effort that went into striking the right balance, Congress intended that IRCA would be a comprehensive, national system for regulating the employment of unauthorized workers. That is why Congress expressly stated that IRCA preempted "any State or local law imposing civil or criminal sanctions (other than through licensing and similar laws) upon those who employ, or recruit or refer for a fee for employment, unauthorized aliens." 8 U.S.C. § 1324a(h)(2). Congress did not contemplate that states and localities would be permitted to pass new legislation that would create their own prohibitions against employing unauthorized workers, create their own methods for adjudicating violations, and impose their own, more severe sanctions for violating state law, all by simply calling it a "licensing law." That is precisely what the Arizona Law has done. In

so doing, Arizona has upset the balance Congress struck and contravened Congressional intent.

CONCLUSION

Amici respectfully submit that the decision below should be reversed, with instructions to vacate the judgment of the district court.

Respectfully submitted,

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AMICUS CURIAE BRIEF

No. 09-115

In The
Supreme Court of the United States

CHAMBER OF COMMERCE
OF THE UNITED STATES OF AMERICA, *et al.*,

Petitioners.

v.

MICHAEL B. WHITING, *et al.*,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF OF STATES, MISSOURI, ALABAMA, ARKANSAS, KANSAS, LOUISIANA, MICHIGAN, MISSISSIPPI, NEBRASKA, NORTH DAKOTA, SOUTH CAROLINA, TENNESSEE, UTAH, AND VIRGINIA AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

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51 Am. Jur. 2d *Licenses and Permits* § 14 (2010) 2, 4, 5
Michael B. Barnett, *The High Cost of Low-Cost Workers: Missouri Enacts New Law Targeting Employers of Unauthorized Workers*, 74 MO. L. REV. 801 (2009) 7, 8
Andorra Bruno, Congressional Research Serv., Unauthorized Aliens in the United States (Apr. 27, 2010) 7
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INTEREST OF AMICUS CURIAE

This case concerns the States' traditional sovereign power to form, license, and regulate businesses, professions, and other persons or entities. Petitioners seek to severely limit this power, or eliminate it altogether, if it involves sanctions against businesses for their employment of "un-authorized aliens." Yet, in the Immigration Reform and Control Act of 1986 (IRCA), Pub. L. No. 99-603, 100 Stat. 3359, codified at 8 U.S.C. § 1324a and § 1324b, Congress recognized the States' power over businesses and explicitly reserved to "State or local law" the power to impose sanctions on "a person *or entity*" – "through licensing and similar laws" – for the employment of "un-authorized aliens." 8 U.S.C. § 1324a(a) & (h)(2) (emphasis added).

To address the growing problem of businesses employing "un-authorized aliens," States have enacted laws consistent with the IRCA's savings clause and their traditional sovereign power to regulate businesses. *See, e.g.*, Colo. Rev. Stat. § 8-17.5-102; La. Rev. Stat. Ann. § 23:992; Miss. Code Ann. § 71-11-3(4)(a); Mo. Rev. Stat. § 285.535; Or. Rev. Stat. § 658.440(3)(d); 73 Pa. Stat. § 820.311; 43 Pa. Stat. § 166.3; S.C. Code Ann. § 41-8-30; Tenn. Code Ann. § 50-1-103(b); Tex. Gov't Code Ann. § 2264.051; Va. Code Ann. § 2.2-4311.1; W. Va. Code § 21-1B-3. The Amici States have a substantial interest in the proper application of these principles to address employment of "un-authorized aliens," and to preserve the States' traditional sovereign power over business entities.

SUMMARY OF THE ARGUMENT

Business entity formation, licensing, and regulation are widely recognized as essential parts of a State's police power. 51 Am. Jur. 2d *Licenses and Permits* § 14 (2010). "A state's police power with regard to the protection of health, morals, and welfare of the public includes, by implication, the right to regulate, by requiring a license as a prerequisite to carrying on of certain activities, commonly designated *as businesses*, occupations, professions, vocations, trades, or callings." *Id.* (emphasis added); *see also DeCanas v. Bica*, 424 U.S. 351, 356 (1976) ("States possess broad authority under their police powers to regulate the employment relationship."). Even Petitioners must concede that there is "traditional state authority to set conditions on issuing licenses." Pet. Br. 28.

The States' traditional sovereign power over professions and also over the formation, licensing and regulation of business entities, has a long history. *See* Harry G. Henn & John R. Alexander, *Law of Corporations and Other Business Enterprises* 24-25 (1983 3d ed.) (describing the historical development of business entities in the United States).[1] This traditional power of the States over business entities has not changed even to this day. *See CTS Corp. v. Dynamics Corp. of Am.*, 481 U.S. 69, 91 (1987). ("It thus is an accepted part of the business landscape in this country for States to create corporations, to pre-

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[1] In most instances, the formation and continued supervision of business entities falls to the office of a secretary of state, division of corporations, or some other state department. *See, e.g.*, http://www.sos.mo.gov/ (Missouri Secretary of State); http://corp.delaware.gov/ (Delaware Division of Corporations); http://www.dos.state.ny.us/ (New York Secretary of State).

scribe their powers, and to define the rights that are acquired by purchasing their shares.")

The States' traditional sovereign power to form, license, and regulate business entities, in addition to professions, is an essential component of efforts to address the growing issues of employment of "unauthorized aliens." Congress, recognizing the States' traditional sovereign power, as well as its own limitation on imposing sanctions against businesses, specifically reserved in the IRCA the States' ability to impose sanctions on "a person or entity" "through licensing and similar laws." 8 U.S.C. § 1324a(a) & (h)(2).

The Petitioners disregard these basic principles and practical limitations, and seek to narrowly interpret the language of the IRCA's savings clause so as to apply only to licensing "to engage in a profession." Pet. Br. 24. This narrow interpretation, which Petitioners advance under the guise of "'licensing' in the traditional sense," Pet. Br. 17, is inconsistent with the States' traditional sovereign power over business entities, the associated presumption against preemption, and the practical needs of the States and the federal government to address the employment of "unauthorized aliens."

ARGUMENT

I. States Have Traditional Sovereign Power to Form, License, and Regulate Businesses.

From the very beginning, the States have held the traditional sovereign power to regulate businesses as well as professions. *See CTS Corp. v. Dynamics Corp. of Am.*, 481 U.S. 69, 91 (1987) (noting that it "is an accepted part of the business landscape for States to create corporations [and] to prescribe their powers"). This power is manifested in many areas, including the power to form, charter, license, and sanction business entities. Each aspect of this traditional sovereign power is an essential part of the States' exercise of police powers. *See* 51 Am. Jur. 2d *Licenses and Permits* § 14 (2010).

In contrast to the States' traditional sovereign power over the formation, licensing, and regulation of businesses, the federal government has not inserted itself into these areas. For example, the federal government does not regulate incorporation, nor the dissolution of corporations.

The federal government did not have the power to incorporate under the Articles of Confederation. Harry G. Henn & John R. Alexander, *Law of Corporations and Other Business Enterprises* 24 (1983 3d ed.) (citing 2 J. Davis, *Essays in the Earlier History of American Corporations* (1917)). "At the constitutional convention in 1787, Madison twice proposed a federal incorporation provision but the proposal was defeated." *Id.* at 25. To this day, there remains no express power to incorporate in the United States Constitution.

And while there have been attempts by the federal government to create a federal incorporation statute or

provision for business entities and licensing, those efforts have failed. In the 1930s, for example, efforts were made to exert more federal control over the formation of corporations and business entities in the form of "a federal incorporation statute or an interstate compact for uniform corporate legislation supplemented by a federal licensing act." *Id.* at 27 (citing Stevens, *Uniform Corporation Law Through Interstate Compacts and Federal Legislation*, 34 MICH. L. REV. 1063 (1936). This was rejected. *Id.*

Once again, in the 1970s, efforts were undertaken to establish "mandatory federal incorporation." *Id.* (citing *Symposium: Federal Incorporation*, 61 GEO. L. J. 71 (1972) and Rubin, *Corporations and Society: The Remedy of Federal and International Incorporation*, 23 AM. U. L. REV. 263 (1973)). Ultimately, however, the formation, licensing, and regulation of business entities has remained principally with the States, just as the employment relationship has remained a traditional area of state concern. *See DeCanas v. Bica*, 424 U.S. 351, 356 (1976) ("[S]tates possess broad authority under their police powers to regulate the employment relationship to protect workers within the state . . . .").

Again, the States have always had the power to form, license, and regulate business entities as part of the States' police power. 51 Am. Jur. 2d *Licenses and Permits* § 14 (2010). And they have actively used that power, not just through statues, but in their own constitutions. In Missouri, as an example, the constitution contains an entire article that has eight sections dedicated solely to "Corporations." Mo. Const., Art. XI, §§ 1-8. It reserves the State's police power over corporations and provides that "[c]orporations shall be organized only under general laws." Mo. Const., Art. XI, § 2. It is the same with many other

state constitutions. *See, e.g.*, Miss. Const., Art. VII (titled "Corporations"); Pa. Const., Art. X (titled "Private Corporations") S.C. Const., Art. IX (titled "Corporations"); W. Va. Const., Art. XI (titled "Corporations").

State regulation has not been limited, of course, to corporations. Consistent with their constitutions and traditional sovereign power, the States have also adopted numerous laws concerning other business entities. *See, e.g.*, Ala. Code Ann. § 10-2A, § 10-9, § 10-12; Ariz. Rev. Stat. § 10, § 29; Mo. Rev. Stat. § 351.010, § 358.010, § 359.011; *see also, e.g.*, Philip G. Louis, Jr., *Business Organizations*, 25 Missouri Practice § 1.1 (2d ed. 2000) ("Numerous statutes have been enacted affecting all aspects of business organizations.").

States have enacted statutes not just addressing the organization of business entities, but also requiring the licensing of businesses. Licensing is an essential part of the regulation of businesses. There are literally hundreds and even thousands of business licensing statutes in the States, and many date back more than a hundred years. *See, e.g.*, *Vaughn v. Missouri*, 1836 WL 2293, *1 (Mo. 1836) (discussing "business licensing" as required by state law); *Missouri v. Richeson*, 1870 WL 5998, *1 (Mo. 1870) (discussing the "trade and business of merchants without license"); *see also, e.g.*, Appendix (providing, as an example of the comprehensive licensing schemes in the States, a survey of all licensing statutes in Missouri). In these business licensing statutes, the States exercise their police power to protect the public, in a very broad sense.

Despite the States' traditional sovereign power and the historic and pervasive state regulation of

businesses through "licensing and similar laws." Petitioners argue that the provision for "licensing and similar laws" in the IRCA does not really apply to business entities, but must, at most, refer to the "traditional regulation of fitness to engage in a profession, such as the farm labor contractor business." Pet. Br. 24. While it is certainly true that "licensing and similar laws" would apply to the regulation of fitness to engage in a profession, this narrow interpretation is inconsistent with the traditional sovereign power of the States as well as the historic and comprehensive state licensing of business entities. It is also inconsistent with another immigration provision in the same title – 8 U.S.C. § 1621 – that defines "state and local public benefits" to include "professional *and commercial* licenses." *Id.* (emphasis added).

Moreover, a fundamental tenet of the preemption doctrine is that in areas of traditional state power there is a presumption against preemption. *See Medtronic, Inc. v. Lohr*, 518 U.S. 470, 485 (1996) (beginning preemption analysis "'with the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was a clear and manifest purpose of Congress'") (quoting *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947)). This is exactly such an area. *See DeCanas*, 424 U.S. at 357. In accordance with the States' traditional sovereign power over business entities, as well as the associated presumption against preemption, the savings clause in the IRCA should not be narrowly construed, limited only to professional licensing.

II. States Have Used Their Traditional Sovereign Power – Consistent With The IRCA – to Address the Growing Problems Posed by the Employment of "Un-authorized Aliens."

For years, the States have continued to see increases in the number of "un-authorized aliens." The Department of Homeland Security estimated the number to be nearly eleven million in January 2009, and the PEW Hispanic Center estimated the number to be nearly twelve million in 2008. *See* Andorra Bruno, Congressional Research Serv., Unauthorized Aliens in the United States (Apr. 27, 2010), *available at* http://digitalcommons.ilr.cornell.edu/key_workplace/732; *see also* Michael B. Barnett, *The High Cost of Low-Cost Workers: Missouri Enacts New Law Targeting Employers of Unauthorized Workers*, 74 MO. L. REV. 801 (2009) ("It is estimated that approximately 65,000 unauthorized workers reside in Missouri."). This translates into "massive" costs to "all levels of government." Kris W. Kobach, *Administrative Law: Immigration, Amnesty, and the Rule of Law*, 36 HOFSTRA L. REV. 1323, 1324 (Summer 2008).

In the face of these increases and associated costs, and Congress' failure to take satisfactory steps, state legislatures began to act to address the "magnet that draws these individuals to America – employment." Michael B. Barnett, *The High Cost of Low-Cost Workers: Missouri Enacts New Law Targeting Employers of Unauthorized Workers*, 74 MO. L. REV. 801 (2009); *see also* State of the State Address, (Jan. 15, 2008), *in* Mo. H.R.J., 2008 Reg. Sess. No. 4 (calling on the Missouri General Assembly to "[t]urn [off] the

magnets" that bring unauthorized workers).[2/] The resulting increase in state and local regulations is "largely the result of states' growing frustration with the lack of federal enforcement of penalties against those employers who violate the IRCA and the fiscal burden of illegal immigration at the state and local level." Hajra I. Malik, *Raiding the American Workplace: Federal Preemption and States' Rights in Curbing Unlawful Alien Employment*, 39 N.M. L. REV. 577, 583 (Summer 2009).

In adopting provisions responding to the problems of employment of "un-authorized aliens," the States relied on the IRCA's savings clause – *i.e.*, the States sought to address the problem "through licensing and similar laws." 8 U.S.C. § 1324a(h)(2). Thus, in Missouri for example, the General Assembly passed laws providing that if a court finds a violation of federal law regarding employment of "un-authorized aliens" (based on federal government notification), then the muni-cipality's or county's governing body shall "suspend the business permit . . . and any applicable licenses or exemptions of the entity." Mo. Rev. Stat. § 285.535.5(2). Similar statutes were enacted in a number of other states. *See, e.g.*, La. Rev. Stat. Ann. § 23:996; Miss. Code Ann. § 71-11-3(7); S.C. Code Ann. § 41-8-50; Tenn. Code Ann. § 50-1-103(e); Va. Code

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[2/] State statutes addressing this issue include the following: Colo. Rev. Stat. § 8-17.5-102; La. Rev. Stat. Ann. § 23:992; Miss. Code Ann. § 71-11-3(4)(a); Or. Rev. Stat. § 658.440(3)(d); 73 Pa. Stat. § 820.311, 43 Pa. Stat. § 166.3; S.C. Code Ann. § 41-8-30; Tenn. Code Ann. § 50-1-103(b); Tex. Gov't Code Ann. § 2264.051; Va. Code Ann. § 2.2-4311.1; W. Va. Code § 21-1B-3.

Ann. §§ 13.1-753, -769, -915, -931, -1046, -1056, -1234, -1246; 50-73.49, -73.58; W. Va. Code § 21-1B-7.[3]

III. The IRCA Permits States to Include Immigration Concerns in the Content and Enforcement of Business Entities "Through Licensing and Similar Laws."

Although the States have specifically sought to regulate within the IRCA's savings clause, Petitioners argue that the States have missed the mark because the mark is exceedingly small. If the Petitioners prevail in their narrow interpretation, however, it will not only undermine the States' traditional sovereign authority to form, license, and regulate business entities, but will also produce some troubling impacts. In fact, under the Petitioners' interpretation of the savings clause, the States can do nothing about businesses that are formed, licensed, and regulated under state law and are violating federal law. Put another way, a State is forced by the Petitioners' interpretation of the IRCA to honor the existence and legitimacy of a business entity (to the potential detriment of its own citizens), that is organized solely under state law, even if the unlawful acts of the business entity would normally result in forfeiture or revocation.

It is not unusual for violations of federal law to be relevant to determinations regarding whether to re-

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[3] Petitioners speculate in their brief concerning possible implementation issues, including the nature of information the States may obtain from the federal government in response to an inquiry, or whether the defenses for I-9 and E-verify can be implemented in a manner consistent with federal law. This kind of speculation, however, is not appropriate in a facial challenge. *See Washington State Grange v. Washington State Republican Party*, 552 U.S. 442, 449-50 (2008).

voke or suspend a state license, even if there was no prior federal adjudication of a violation. *See, e.g.*, *Olson v. Sate Mortuary & Cemetery Bd.*, 216 P.3d 325, 331-32 (Or. Ct. App. 2009) (taking action against a license for alleged violations of federal regulations); *In re Disciplinary Matter of Billings*, 30 P.3d 557, 569 (Wyo. 2001) (suspending action against outfitter's license for violations of federal regulations); *Boswell v. Iowa Bd. of Veterinary Med.*, 477 N.W.2d 366, 367-68 (Iowa 1991) (revoking veterinarian's license for violations of federal law); *Jones v. Washington*, 166 P.3d 1219, 1222-223, 1227 (Wash. Ct. App. 2007) (tort action arising out of suspension of pharmacist's license for, among other things, issuing prescriptions that did not comply with federal regulations). Similarly, state statutes often look to and incorporate federal law for purposes of licensing and regulation. *See, e.g.*, Ala. Code Ann. § 5-26-13 (providing license can be revoked for failure to comply with federal law); Ark. Code Ann. § 27-16-1111 (permitting license renewal if continued presence in United States is Authorized under federal law); Mo. Rev. Stat. § 42.127 (requiring veterans' homes to participate in a "program administered by the United States Department of Veterans' Affairs"); § 198.067 (providing penalties for a licensed operator of a nursing home facility who violates state or federal law).

Contrary to the Petitioners' interpretation, the IRCA's savings clause includes state laws regarding business entities when it authorizes the States to enact legislation "through licensing and similar laws," in order to sanction business entities that employ "unauthorized aliens." 8 U.S.C. § 1324a(h)(2). Arizona and other States have done just that, and the savings clause does not preempt those statutes.

The Arizona laws at issue and similar laws in other States are appropriate because they are consistent with the traditional sovereign power of the States over the formation, licensing, and regulation of business entities. But they are also appropriate for very practical reasons. Congress recognized in the IRCA that the States have a unique statutory framework within which to complement the enforcement of federal laws addressing the employment of "un-authorized aliens." Thus, Congress specifically exempted state "licensing and similar laws" from preemption in the IRCA and thereby expressly acknowledged that the States can enact laws concerning immigration for this purpose.

Under the IRCA, employers cannot hire, recruit, or refer for a fee "for employment in the United States an alien knowing the alien is an unauthorized alien." 8 U.S.C. § 1324a(A)(1)(A). The IRCA also establishes criminal penalties for business entities that have a pattern or practice of unlawfully employing "unauthorized aliens." 8 U.S.C. § 1324a(f)(1). But consistent with the traditional federal deference to state regulation of businesses, the IRCA does not provide for the forfeiture or revocation of any business licenses or the privilege of maintaining a business.

Such forfeiture or revocation of a business license or the formation documents of a business entity is an essential part of the States' regulatory framework. *See, e.g., Rattray v. Novello*, 847 N.Y.S. 2d 258 (N.Y. App. Div. 2007) (State revoked doctor's license and his office's certification of incorporation for violating state and federal laws); *see also, e.g.*, Mo. Rev. Stat. § 347.183 (providing the State power to cancel a business entities' operative document for failure to comply with state or federal law). Those state laws complement, rather than replace, federal enforcement.

Indeed, absent this complementary approach between federal and state law, a significant deterrent to employing "un-authorized aliens" would be missing.

More importantly, without the IRCA's reservation of the States' traditional power over business entities, the States would be left with no recourse concerning the employment of "un-authorized aliens" by business entities over which they otherwise have ultimate sovereign control and authority. *See Hopkins Fed. Sav. & Loan Ass'n v. Cleary*, 296 U.S. 315, 336-38 (1935) (holding that the dissolution of state-chartered corporations is a matter of state law and that the Tenth Amendment bars Congress from authorizing a federal agency to dissolve such corporations "in other ways and for other causes" than state law permits). If this Court adopted the narrow reading that Petitioners suggest – that the savings clause allows only the "regulation of fitness to engage in a profession" – then the only control that the States would have over business entities *vis-à-vis* employment of "un-authorized aliens" would be to sanction a professional license.

Professionals, however, are unlikely to personally employ "un-authorized aliens." Instead, it is the business entities with which the professionals are associated that are likely to do so, thereby leaving a gap in enforcement under Petitioners' interpretation. Suppose, for example, that a group of surgeons organize into a partnership or a limited liability company formed under state law. The partnership or limited liability company then hires "un-authorized aliens" to do tasks for the business. Which surgeon's license would be sanctioned under the Petitioners' theory? The one who signs the paychecks or that interviewed the applicant? Suppose none of the surgeons were involved in any of the employment

aspects of the business and did not even know that their business was employing "un-authorized aliens." What then? State laws like the one before the Court attack misdeeds by the entity, in ways that federal law cannot.

The Petitioners' attempt to apply the savings clause only to professional licenses would disregard the very root of the problem that the federal law seeks to correct – employment of "un-authorized aliens." Indeed, professional licensing does not generally concern employment; instead, it concerns standards of care or industry standards. Only the business aspects of a profession address the issues of employing "un-authorized aliens." Thus, to limit the States' specifically reserved power to sanction "through licensing and similar laws" only to professional licenses would be to eradicate the IRCA's very purposes and to misdirect the entire effort away from the root issue that the IRCA seeks to address.

A state sanction against a business entity or a professional's license for employment of an "un-authorized alien" is an effective complement to federal law. The States have the practical ability to fill the enforcement gap; the IRCA can and should be read to permit the States to act.

CONCLUSION

For the foregoing reasons, the Court should affirm the court of appeals.

Respectfully submitted,

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Statute	License	Issuer	State Control	Date
42.127	License to operate facility as a Missouri veterans' home	MO Vet's Comm'n		1989
64.470	License to operate disposal area (dump)	County Comm'n		1955
67.275	License for electrical contractor	City/ County		2004
67.1263	License to do business as association providing health care insurance for county prisoners	Dept. of Ins., Fin. Inst. & Prof'l Reg. (DIFP)		1998
67.1809	License and regulate taxicab companies in St. Louis region	Reg'l Taxicab Comm'n		2005
67.1844	License for contractor performing excavation work in public right-of-way			2001

Statute	License	Issuer	State Control	Date
71.700	License for springs, wells or other water supply source	City		1939
77.505	Authorizes cities to license electrical contractors and electricians	City		1990
92.045	Authorizes certain cities to license the occupation of merchants, manufacturers, and all businesses, avocations, pursuits, and callings	City		1967
94.020	Authorizes 3d class city council to provide by ordinance for licenses	City Council		1939
142.830	License for interstate motor fuel user	Director of Revenue	142.905 – Revocation, civil penalty, offense of operating w/o license	1998

Statute	License	Issuer	State Control	Date
142.890	License for transporting motor fuel	Director of Revenue	142.905 – Revocation, civil penalty, offense of operating w/o license	1998
142.893	Distributor's license for motor fuel	Director of Revenue	142.905 – Revocation, civil penalty, offense of operating w/o license	1998
144.083	Retail sales tax license if business selling tangible personal property	Director of Revenue	144.118 – Admin. Penalty	1961
149.035	License for wholesaler of cigarettes or tobacco products	Director of Revenue	149.203 - Revoke/ suspend license	1974
150.100	License for person, corporation, copartnership or association acting as merchant	County Comm'n	150.23 - Forfeiture of license	1939
150.310	License for manufacturers	County		1939

Statute	License	Issuer	State Control	Date
150.390	License required of itinerant vendor (temporary or transient business of selling goods)		150.41 - Penalty for noncom-pliance	1939
150.480	License required for "peddlers"	County		1939
168.011	License to teach public school	State Board of Educa-tion	168.071 - Discipline	1963
170.161	License to sell textbooks		170.161 - Penalty	1963
188.065	License revocation if physician, surgeon, or nurse acts in violation of abortion laws			1974
190.105	License to operate ambulance service	Dept. of Health & Senior Servs. (DHSS)		1973
190.108	License to operate air ambulance service	DHSS		1998

Statute	License	Issuer	State Control	Date
190.109	License to operate ground ambulance service	DHSS		1998
190.133	License to operate emergency medical response agency	DHSS		1998
190.142	License for emergency medical technician	DHSS		1998
190.142	License for temporary emergency medical technician	DHSS	190.165 - Discipline, censure, revocation	1998
190.500	Temporary license for national guard, trauma treatment, emergency program	DHSS		1999
190.528	License to operate stretcher van service	DHSS		2002
196.313	License required to buy, sell, trade or traffic in eggs	Dept. of Agriculture (Ag.)	196.351 Suspension, revocation	1955

Statute	License	Issuer	State Control	Date
196.455	License required to operate locker plant	Ag.	196.515 – Suspension, revocation	1945
196.866	License to manufacture or freeze ice cream, mellorine, frozen dessert products	DHSS	196.866.4 - Withhold/ refuse issuance, revoke	1955
196.868	License required for out-of-state manufacturer of ice cream to sell	DHSS		1959
197.040	License to establish, conduct or maintain a hospital	DHSS	197.070, .020 - Denial, suspension, revocation; Offense of operating w/o license	1953
197.205	License to establish an ambulatory surgical center	DHSS	197.220, .235 - Denial, suspension, revocation; Offense of operating w/o license	1975

Statute	License	Issuer	State Control	Date
197.315	Certificate of need required of any proposal to develop a new institutional health service	Mo. Health Facili-ties Review Comm.		1979
197.405	License to operate home health services or home health agency	DHSS	197.440 - Refuse to issue, suspend, revoke	1983
197.420	Temporary license to operate home health agency if ownership transfer	DHSS	197.440 - Refuse to issue, suspend, revoke	1983
198.015	License to establish, conduct or maintain a residential care facility, assisted living facility, intermediate care facility, or skilled nursing facility	DHSS	198.015, .061, .026, .036-, Offense of operating w/o license; Inspection; Revocation	1979

Statute	License	Issuer	State Control	Date
198.124	License to a facility being operated by a receiver	DHSS		1979
205.769	Authorizes counties to inspect and license eating establish-ments	County Health Dept., by DHSS Stand-ards	205.769.3 - Suspension	1986
209.321	License to engage in the practice of interpreting for the deaf	Comm. est. w/in DIFP	209.334 - Refuse to issue, suspend, revoke	1994
209.326	Temporary license to engage in the practice of interpreting for the deaf	Comm. est. w/in DIFP		1994
210.211	License required to establish, maintain or operate a child-care facility	DHSS	210.221 - Deny, suspend, place on probation or revoke	1949
210.484	License required for residential care facilities	DHSS		1993

Statute	License	Issuer	State Control	Date
210.486	License to operate or maintain foster home, residential care facility, child placing agency	Dept. of Social Services (DSS)	210.496 - Refuse to issue, suspend, revoke	1982
226.670	License to operate, establish, or maintain a junkyard	High-way & Transp. Comm'n		1965
237.010	License to keep a ferry	County Comm'n	237.090, .100 -- Revoca-tion, fine, imprison-ment	1939
260.350	License to operate as hazardous waste transporter	Dept. of Natural Re-sources (DNR)		1977
260.350	Permit to operate as hazardous waste facility owner and operator	DNR		1977
265.060	License to inspect and classify agricultural products	Ag.		1939

Statute	License	Issuer	State Control	Date
265.410	License to operate commercial plant for livestock or poultry slaughter, processes meat	Ag.	265.450, .460 - Suspend or revoke; Offense of operating w/o license	1967
267.615	License to lease, loan male animals of bovine or suis species for breeding purposes	Ag.	267.635 - Revocation	1959
267.620	License to produce semen for artificial insemination of female animals	Ag.	267.635 - Revocation	1959
269.080	License permitting bodies of dead animals to be transported out of state	State Veteri-narian	269.080 – Revoca-tion, suspension	1941
273.070	License tag for dogs	County Clerk		1939

Statute	License	Issuer	State Control	Date
273.327	License for animal shelter, dog pound, boarding or commercial kennel, pet shop	Ag.	273.329, .338 - Refuse to issue/ renew, revoke, fine	1992
276.411	License to operate as grain dealer	Ag.	276.423, .461, .571 - Modify, suspend, revoke, cancel, enjoin operation	1980
277.030	License to operate a livestock sale or market	Ag.	277.050 - Suspend, revoke	1943
280.030	License required for treated timber producer to sell		280.038, .040 - Late penalty, suspend, revoke	1961
281.035	License for certified commercial applicator of pesticides	Ag.	281.060 - Deny, suspend, revoke, or modify	1974
281.037	License for certified non-commercial applicator of pesticides	Ag.	281.060 - Deny, suspend, revoke, or modify	1977

Statute	License	Issuer	State Control	Date
281.038	License for pesticide technician	Ag.	281.060 - Deny, suspend, revoke, or modify	1988
281.040	License for private applicator of pesticides	Ag.	281.060 - Deny, suspend, revoke, or modify	1974
281.045	License for public operator	Ag.	281.060 - Deny, suspend, revoke, or modify	1974
281.050	License to operate as pesticide dealer	Ag.	281.060 - Deny, suspend, revoke, or modify	1974
281.116	License to perform termite inspections: certified commercial applicator's license, pesticide technician's license, certified non-commercial applicator's license or a certified	Ag.		2001

Statute	License	Issuer	State Control	Date
281.116 Con't	public operator's license in subcategory 7b-termite pest control			
285.535	Suspension of permit, license, or exemption of business entity that knowingly employs unauthorized aliens	Attorney General	285.535 - Attorney General enforces require-ments	2008
287.061	Certificate of insurance for workers' compensation coverage required for city or county to issue occupational or business license for construction industry contractor	City or County	287.061.2 - Denial of license for noncom-pliance	1993

Statute	License	Issuer	State Control	Date
287.967	License for advisory organization to provide any service relating to insurance rates	Director of DIFP	287.940 - Suspend/ revoke of license of advisory org./ insurer for insurance rate violations	1993
301.114	License to conduct business as service agent to obtain motor vehicle certificate of ownership	Dept. of Revenue	301.119 - Suspend or revoke	1984
301.218	License to operate as used parts dealer, salvage dealer, rebuilder or body shop, mobile scrap processor	Dept. of Revenue	301.223 - Suspend/ revoke	1979
301.553	License to operate business as motor vehicle dealer, boat dealer, manufacturer, boat	Dept. of Revenue	301.562, 570 - Refuse to issue/ renew, suspend, revoke; Offense of	1988

Statute	License	Issuer	State Control	Date
301.553 Con't.	manufacturer, public motor vehicle auction, wholesale motor vehicle auction or dealer		sale w/o license	
302.020	License to operate a motor vehicle or motorcycle		302.020.3 - Offense of operating without license	1939
311.050	License to manufacture, distill, blend, sell or expose for sale intoxicating liquor	Super-visor of Alcohol & Tobacco Control	311.557 - Revoke, suspend	1939
311.095	License to sell intoxicating liquor on resort, temporary license	Alcohol & Tobacco Control	311.680, .720 - Warning, probation, revocation or suspen-sion, civil penalty; Automatic revocation if conviction	1967

Statute	License	Issuer	State Control	Date
311.096	Licenses to sell liquor by the drink not for consumption on premises, convention areas	Alcohol & Tobacco Control	311.680 - Warn, probation, revoke, suspend	1967
311.097	License to sell intoxicating liquor at restaurant bar; restaurant bar at sports stadium	Alcohol & Tobacco Control	311.680 - Warn, probation, revoke, suspend	1971
311.098	License to sell intoxicating liquor at amusement place	Alcohol & Tobacco Control	311.680 - Warn, probation, revoke, suspend	1983
311.099	License to sell intoxicating liquor in rooms of qualified establishment via controlled access liquor cabinet system	Alcohol & Tobacco Control	311.680 - Warn, probation, revoke, suspend	1984

Statute	License	Issuer	State Control	Date
311.102	License to sell intoxicating liquor on premises of place of entertainment	Alcohol & Tobacco Control	311.680 - Warn, probation, revoke, suspend	1984
311.185	License to operate as wine direct shipper	Alcohol & Tobacco Control	311.680 - Warn, probation, revoke, suspend	2007
311.190	License for the privilege of manufacturing wine or brandy	Alcohol & Tobacco Control	311.680 - Warn, probation, revoke, suspend	1943
311.195	License for micro-brewery	Alcohol & Tobacco Control	311.680 - Warn, probation, revoke, suspend	1990
311.200	License for retail sale of intoxicating liquor in original package	Alcohol & Tobacco Control	311.680 - Warn, probation, revoke, suspend	1939

Statute	License	Issuer	State Control	Date
311.273	Special license for Sunday sales, malt liquor, certain beers at St. Louis sports stadiums	Alcohol & Tobacco Control	311.680 - Warn, probation, revoke, suspend	1981
311.293	License for retail sale of intoxicating liquor on Sundays	Alcohol & Tobacco Control	311.680 - Warn, probation, revoke, suspend	1993
311.420	License to transport intoxicating liquors in quantities larger than five gallons	Alcohol & Tobacco Control	311.430 - Revocation	1939
311.481	License to sell intoxicating liquor by the drink on Sundays	Alcohol & Tobacco Control	311.680 - Warn, probation, revoke, suspend	2002
311.486	Special license to caterers/ other license holder to sell intoxicating liquor by the drink at a particular function,	Alcohol & Tobacco Control	311.680 - Warn, probation, revoke, suspend	2004

Statute	License	Issuer	State Control	Date
311.486 Con't.	occasion, or event			
311.487	License for sale of malt liquor and Missouri-produced wines the Missouri state fair	Alcohol & Tobacco Control	311.680 - Warn, probation, revoke, suspend	1993
313.010	License to conduct bingo game for religious, charitable, fraternal, veteran, service org.	Mo Gaming Comm'n	313.070 - Suspend, revoke	1981
313.020	Abbreviated license for conducting bingo pull-tab card games	Mo Gaming Comm'n	313.052, .070 - Penalties, suspen-sion, revocation	1981
313.057	License to manufacture, sell, lease or distribute bingo equipment	Mo Gaming Comm'n	313.070 - Suspend, revoke	1984
313.255	License for lottery game retailers	Mo Gaming Comm'n	313.255, .435 - Suspend, revoke; Deny license if	1985

Statute	License	Issuer	State Control	Date
313.255 Con't.			person owes debt to state	
313.580	License for horse race track	Mo Gaming Comm'n	313.605, .610 - Revocation if state public official holds any financial interest; Offense of operation w/o license	1986
313.640	Occupation license for horse race track licensee, association employee, concessionaire contract holder, owner/gen manager, racing official	Mo Gaming Comm'n	313.650 - Refuse, revoke or suspend	1986
313.807	License to conduct gambling games on an excursion gambling boat or to	Mo Gaming Comm'n	313.807.14 - Penalties, suspension or revocation	1991

Statute	License	Issuer	State Control	Date
313.807 Con't.	operate an excursion gambling boat			
313.840	License to serve liquor aboard any excursion gambling boat	Mo Gaming Comm'n		1991
315.011	License to operate a lodging establishment	DHSS	315.041 - Refuse issuance, revoke	1985
316.040	License to operate theatrical or minstrel perfor-mances, exhibitions, shows, circuses, menageries, skating rinks, professional athletic exhibitions, dance halls, penny or picture arcade, theater or motion picture theater,	County Comm'n		1939

Statute	License	Issuer	State Control	Date
316.040 Con't.	drive-in theaters, cabaret or floor show, amusement hall or parlor, music hall or room or other commercial amusement place, miniature golf courses, pony rides, pinball machines, marble machines, music vending machines and any other device			
316.155	License to operate, maintain, conduct, advertise, sell or furnish tickets for a festival	County Comm'n	316.155, .180 - Deny issuance; State or county may apply for injunction against festival	1975

Statute	License	Issuer	State Control	Date
317.011	Permit to hold professional boxing, sparring, professional wrestling, professional kickboxing or professional full-contact karate contests	DIFP	317.015 - Refuse to issue, file complaint against licensee;	1983
319.306	Blaster's license required to use explosives			2007
324.056	Permit to practice occupational therapy or occupational therapy assistant	Bd. of OT, DIFP	324.086 - Refuse to issue/ renew, file complaint	1997
324.130	License to engage in practice of perfusion	DIFP	324.171 - Refuse to issue/ renew, file complaint	1997
324.147	Provisional license to engage in practice of perfusion	DIFP	324.171 - Refuse to issue/ renew, file complaint	1997

Statute	License	Issuer	State Control	Date
324.212	License to practice as licensed dietician	State Comm. of Dicti-cians	324.217 - Refuse to issue/ renew, file complaint	1998
324.247	License to operate a massage business		324.262 - Refuse to issue/ renew/rein state, file complaint	1998
324.265	License to practice massage therapy	Bd. of Thera-peutic Massage		1998
324.409	Certificate of registered interior designer	Interior Design Council	324.436 - Refuse to issue/ renew/rein state, file complaint	1998
324.487	License to practice acupuncture	Acu-punctur-ist Advi-sory Comm.	324.496 - Refuse to issue/ renew/re-instate, file complaint	1998
324.522	License for practitioner of tattooing, body piercing or branding	DIFP		1998
324.522	License to operate establishment where	DIFP		1998

Statute	License	Issuer	State Control	Date
324.522 Con't.	tattoos, body piercing or brandings are applied			
324.526	Temporary license for practitioner of tattooing, body piercing or branding	DIFP	324.624 - Deny, suspend, revoke, censure, place on probation	2004
324.609	Licensed private fire investigator or licensed private fire investigator agency	Division of Fire Safety		2004
324.703	License to engage in business of housemoving on roads/ highways	Division of Motor Carrier & RR Safety	324.742 - Offense of violation of regulations	2001
324.715	Special permit from Dept. of Transp. for move on state highway system		324.733 - Permit voided if conditions violated	2001
324.1104	License to engage in private investigator business or	Bd. of Private Investi-gator Ex-	324.1134 - Suspend, refuse to renew	2007

Statute	License	Issuer	State Control	Date
324.1104 Con't.	private investigator agency	aminers		
324.1140	License to train private investigators	Bd. of Private Investi-gator Ex-aminers		2007
325.015	License to act as a public adjuster or public adjuster solicitor	DIFP	325.030, .035 - Revoke, suspend, refuse to issue	1973
326.280	License to practice as accountant	Bd. of Account ancy	326.310 - Refuse to issue, file complaint	2001
327.131	License to practice as an architect	Bd. of Archi-tects, Prof'l Engi-neers, Prof'l Land Sur-veyors & Land-scape Archi-tects (APELS LA)	327.441 - Deny, suspend, revoke	1969

Statute	License	Issuer	State Control	Date
327.221	License to practice as a professional engineer	(APELS LA)	327.441 - Deny, suspend, revoke	1969
327.314	License to practice professional land surveyor	(APELS LA)	327.441 - Deny, suspend, revoke	1983
327.392	Professional engineering license	(APELS LA)	327.441 - Deny, suspend, revoke	2006
327.612	License to practice as a landscape architect	(APELS LA)		1989
328.020	License to practice occupation of a barber	Bd. of Cosme-tology & Barber	328.120 - Deny, suspend, revoke	1939
328.115	License to operate barber establishment	Bd. of Cosme-tology & Barber	328.150 - Deny, suspend, revoke	1939
328.120	License to own and operate a barber school or college	Bd. of Cosme-tology & Barber	328.150 - Deny, suspend, revoke	1939
329.030	License to practice occupation of cosmetology	Bd. of Cosme-tology & Barber	329.255 - Infraction of practice w/o certificate	1939

Statute	License	Issuer	State Control	Date
329.030	License to operate establishment or school of cosmetology	Bd. of Cosmetology & Barber	329.255 - Infraction of practice w/o certificate	1939
329.040	License to own a school of cosmetology	Bd. of Cosmetology & Barber	329.255 - Infraction of practice w/o certificate	1939
329.080	License as an instructor trainee in cosmetology, esthetics or manicuring	Bd. of Cosmetology & Barber	329.255 - Infraction of practice w/o certificate	1939
330.020	License to practice podiatric medicine	Bd. of Podiatric Med.	330.160, .195 - Deny, revoke, suspend; Enjoin practice w/o license	1939
331.030	License to practice as chiropractor	Bd. of Chiropractic Examiners	331.160, .185 - Deny, revoke, suspend; Enjoin or restrain practice w/o license	1939
332.181	License to engage in the practice of	Dental Bd.	332.321 - Refuse to issue/	1969

Statute	License	Issuer	State Control	Date
332.181 Con't.	dentistry		renew, suspend, revoke, censure, order restitution, civil penalty	
332.101	License to practice as a dental hygienist	Dental Bd.		1969
332.201	Temporary license to practice dentistry	Dental Bd.	332.321 - Refuse to issue/ renew, suspend, revoke, censure, order restitution, civil penalty	1969
333.031	License to practice either embalming or funeral directing	Bd. of Embal-mers & Funeral Dir.	333.330, .261 - Refuse to issue, file complaint; Offense of violation of regs	1965
333.061	License for the operation of a funeral establishment	Bd. of Embal-mers & Funeral Dir.	333.330, .261 - Refuse to issue, file complaint;	1965

Statute	License	Issuer	State Control	Date
333.061 Con't.			Offense of violation of regs	
333.315	License to provide preneed funeral contract or perform services under such contract	Bd. of Embal-mers & Funeral Dir.	333.330, .261 - Refuse to issue, file complaint; Offense of violation of regs	2009
333.320	License to sell preneed funeral contract	Bd. of Embal-mers & Funeral Dir.	333.330, .261 - Refuse to issue, file complaint; Offense of violation of regs	2009
334.031	License to practice as physician and surgeon	Bd. of Regist. for Healing Arts	334.100, .101, .103, .107 - Refuse to issue/ renew, file complaint; Publish list of persons w/ license suspended, revoked, sur-rendered, restricted, denied or	1959

Statute	License	Issuer	State Control	Date
334.031 Con't.			withheld; Automatic revocation where licensee guilty of felony; Grounds to deny, revoke, suspend	
334.045	Temporary license to practice as physician and surgeon	Bd. of Regist. for Healing Arts	...same	1963
334.046	Temporary license to qualified physician to teach or lecture	Bd. of Regist. for Healing Arts	...same	1986
334.112	Limited license to practice medicine	Bd. of Regist. for Healing Arts		1993
334.404	License to practice as anesthesiologist assistant	Bd. of Regist. for Healing Arts	334.414.4, .428 - Refuse to issue/ renew, revoke, suspend; Offense of practice	2003

Statute	License	Issuer	State Control	Date
334.404 Con't.			w/o license	
334.406	Temporary license to practice as an anesthesiologist assistant	Bd. of Regist. for Healing Arts	334.414.4, .428 - Refuse to issue/ renew, revoke, suspend; Offense of practice w/o license	2003
334.510	License to practice as physical therapist	Bd. of Regist. for Healing Arts	334.613, .610, .615, .616 - Refuse to issue/ renew, issue license subject to probation, restriction, or limitation; file complaint; Offense of practice w/o license; suspend or restrict; Automatic revocation where	1969

Statute	License	Issuer	State Control	Date
334.510 Con't.			licensee guilty of felony	
334.550	Temporary license to practice as physical therapist	Bd. of Regist. for Healing Arts		1969
334.650	License to practice as physical therapist assistant	Bd. of Regist. for Healing Arts		1996
334.665	Temporary license to practice as physical therapist assistant	Bd. of Regist. for Healing Arts	334.686 - Offense of practice w/o license	1996
334.704	License to practice as athletic trainer	Bd of Regist. for Healing Arts	334.715, .745 - Refuse to issue, revoke, suspend; Offense of practice w/o license	1983
334.738	License to practice as a physician assistant	Bd. of Regist. for Healing Arts	334.740 - Offense of practice w/o license	1989
334.736	Temporary license to practice as a	Bd. of Regist. for	334.740, .741 - Offense of	1995

Statute	License	Issuer	State Control	Date
334.736 Con't.	physician assistant	Healing Arts	practice w/o license; Revoke, suspend	
334.820	License to practice as respiratory care practitioner, therapist, or technician	Bd. for Respiratory Care	334.880, .920 - Offense of practice w/o license; Refuse to issue or renew, file complaint	1996
335.046	License to practice as a registered professional nurse	Bd. of Nursing	335.066 - Refuse to issue/ reinstate, file complaint	1975
336.060	License to practice as an optometrist	Bd. of Optometry	336.110 - Refuse to issue or renew, file complaint	1939
337.020	License to practice as a psychologist (including temporary, provisional or permanent)	State Comm of Psychologists	337.035 - Refuse to issue any certificate of registration or authority, permit or license	1977

Statute	License	Issuer	State Control	Date
337.325	Licensed behavior analyst; Licensed assistant behavior analyst	Behavior Analyst Adv. Bd.	337.330 - Refuse to issue, file complaint	2010
337.345	Provisional behavior analyst license	State Comm. of Psychologists		2010
337.505	License to practice professional counseling	Comm. for Professional Counselors	337.525, .530 - Refuse to issue or renew, file complaint; Offense of practice w/o license	1985
337.603	License to practice clinical social work	State Comm. for Social Workers	337.630 - Refuse to issue, file complaint	1989
337.643	License to practice as master social worker	State Comm. for Social Workers		2007
337.645	License as advanced macro social worker	State Comm. for Social Workers		2007

Statute	License	Issuer	State Control	Date
337.653	License to practice as baccalaureate social worker	State Comm. for Social Workers		2001
337.703	License to practice as marital and family therapist	State Comm. for Marital and Family Thera-pists	337.730, .733 - Offense of practice w/o license	1995
338.013	Certificate of registration as a pharmacy technician	Bd. of Pharm-acy		1997
338.035	License to practice as an intern pharmacist	Bd. of Pharm-acy		1990
338.043	Temporary license to practice as a pharmacist	Bd. of Pharm-acy		1990
338.050	License to practice as a pharmacist	Bd. of Pharm-acy	338.055, .067, .195 - Refuse to issue, file complaint; Revo-cation; Offense of practice w/o license	1939

Statute	License	Issuer	State Control	Date
338.220	License to open, establish, operate, or maintain any pharmacy	Bd. of Pharm-acy	338.055, .285 - Refuse to issue; File complaint	1951
338.333	License to act as a wholesale drug distributor or pharmacy distributor	Bd. of Pharm-acy	338.055, .353- Refuse to issue; File complaint	1989
338.335	Separate license required for each distribution site owned or operated by distributor	Bd. of Pharm-acy		1989
338.337	License for out-of-state wholesale drug distributor	Bd. of Pharm-acy		1989
339.020	License to act as a real estate broker, broker-salesperson, or salesperson	Mo. Real Estate Comm'n	339.080, .100, .110, .180 - Refuse to examine or issue a license; Investi-gate, file complaint;	1941

Statute	License	Issuer	State Control	Date
339.020 Con't.			Refuse license if guilty of certain crimes; Offense of practice w/o license	
339.090	License for nonresidents	Mo. Real Estate Comm'n		1941
339.501	License to act as real estate appraiser	Real Estate Ap-praisers Comm'n	339.532, .549 - Refuse to issue or renew, file complaint; Offense of practice w/o license	1998
339.523	Certification or license as a state-certified or state-licensed real estate appraiser	Real Estate Ap-praisers Comm'n	339.532, .549 - Refuse to issue or renew, file complaint; Offense of practice w/o license	
339.111	License to engage in business as an appraisal management company	Real Estate Ap-praisers Comm'n	339.1235 - Censure, suspend/ revoke, impose civil	2010

Statute	License	Issuer	State Control	Date
339.111 Con't.			penalties	
340.216	License to practice veterinary medicine	Mo. Veteri-nary Medical Bd.	340.246, .274 - Refuse to issue or renew, file complaint; Automatic revocation where licensee guilty of felony	
340.247	Veterinary faculty license	Mo. Veteri-nary Medical Bd.	340.264, .247 - Refuse to issue or renew, file complaint; Cancel	1999
340.248	Temporary license to out-of-state veterinarian	Mo. Veteri-nary Medical Bd.	340.264 - Refuse to issue or renew, file complaint	1992
340.300	Registration for practice as a veterinary technician	Mo. Veteri-nary Medical Bd.	340.330 - Refuse to issue or renew, file complaint	1992
341.010	Certificate to work in business of plumbing	City		1939

Statute	License	Issuer	State Control	Date
341.140	License to work as plumber or drainlayer (1st class counties)	County	341.190 - Revoke/ suspend	1943
341.170	License to work as master plumber or master drainlayer	County		
343.010	License to exercise business of a public auctioneer	County Comm'n	343.250 - Offense to operate w/o license, and dis-qualified from operating for 1 yr	1939
343.100	License to non-resident public auctioneer	County Comm'n	343.250 - Offense to operate w/o license, and dis-qualified from operating for 1 yr	1939
344.020	License to act as nursing home administrator	Bd of Nursing Home Admin.	344.050, .100 - Refuse to issue or	1969

Statute	License	Issuer	State Control	Date
344.020 Con't.			renew, issue probationary license file complaint; Offense to act w/o license	
345.020	License to practice speech-language pathology or audiology	Bd. of Registration for Healing Arts	345.065, .075 - Refuse to issue or renew, issue probationary/ restricted license, file complaint; Offense to operate w/o license	1973
346.015	License to practice of fitting hearing instruments	Bd of Examiners for Hearing Instrument Specialists	346.105 - Refuse to issue, file complaint	1973
346.070	Temporary permit to practice of fitting	Bd. of Examiners for Hearing	346.105 - Refuse to issue, file complaint	1973

Statute	License	Issuer	State Control	Date
346.070 Con't.	hearing instruments	Instru-ment Special-ists		
354.230	License to act as enrollment representativ e for health services corporation	Director of DIFP	354.275 - Revocation	1983
361.705	License to issue checks for consideration	Director of Division of Finance	361.725 - Deny, revoke, suspend	1984
362.440	License for foreign banking corporation	Director of Division of Finance	362.450 - Revoke, publish notice of revocation	1939
364.030	License to do business as financing institution	Director of Division of Finance	364.040 - Deny renewal, revoke, suspend	1963
365.030	License to do business as sales finance company	Director of Division of Finance	365.040 - Deny renewal, revoke, suspend	1963
367.043	License to operate a pawnshop	Director of Division of Finance	367.050 - Offense to operate w/o license	1990

Statute	License	Issuer	State Control	Date
367.509	License to engage in title loan business	Director of Division of Finance		1998
374.702	License to act as bail bond agent or general bail bond agent	Director of DIFP	374.750 - Refuse to issue or renew, file complaint	1983
374.740	License to act as nonresident general bail bond agent	Director of DIFP	374.750 - Refuse to issue or renew, file complaint	1983
374.783	License to act as surety recovery agent	Director of DIFP	374.784, .789 - Refuse to issue; Offense to acting w/o license	2004
375.014	License to sell, solicit or negotiate insurance	Director of DIFP	375.141, .046 - Refuse to issue or renew, revoke, suspend; Cease and desist order, order civil penalties	1965

Statute	License	Issuer	State Control	Date
375.017	License for non-resident to sell, solicit or negotiate insurance	Director of DIFP	375.141, .046 - Refuse to issue or renew, revoke, suspend; Cease and desist order, order civil penalties	1965
375.065	License to operate as organiza-tional credit entity	Director of DIFP		2000
375.112	License to act as reinsurance intermediary or reinsurance intermediary-broker	Director of DIFP		1991
378.629	License for foreign fraternal benefit society	Director of DIFP		1992
379.235	License for mutual insurance company other than life and fire	Director of DIFP		1939

Statute	License	Issuer	State Control	Date
379.323	License as a rating organization for insurance other than life	Director of DIFP		1972
379.445	License as a rating organization for casualty and surety	Director of DIFP	379.485 - Suspend, revoke	1947
379.670	License to exchange insurance contracts	Director of DIFP	379.750 - Suspend, revoke	1939
379.130	License to do insurance business as captive insurance company	Director of DIFP	379.1316 - Suspend, revoke	2007
379.136	License to special purpose life insurance captive to conduct reinsurance	Director of DIFP		2007
381.052	License to transact title insurance business	Director of DIFP		2000
381.115	License to act as title insurer, title agency, or	Director of DIFP		2000

Statute	License	Issuer	State Control	Date
381.115 Con't.	title agent			
383.020	License to association to provide malpractice insurance	Director of DIFP		1975
384.043	License for surplus lines insurance	Director of DIFP	384.065 - Suspend, revoke, refuse to renew	1987
388.510	License to foreign/non-resident railway corporation	Dept. of Trans.		1939
390.051	Certificate to operate business of a common carrier	Division of Motor Carrier and Railroad Safety		1939
390.063	Certificate or permit for common carrier transporting elderly, handicapped, Head Start	Division of Motor Carrier and Railroad Safety		1992
390.136	License for vehicle used by common carrier (annual or	State Hwy & Transp. Comm'n		1939

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Statute	License	Issuer	State Control	Date
390.136 Con't.	72-hour regulatory license)			
390.270	Registration for property carrier	State Hwy & Transp. Comm'n		1996
393.299	Certification to provide energy services	Public Service Comm'n		1998
407.327	Registration of health spa	Attorney General		1988
407.456	Registration of charitable organization/ professional fund-raiser	Attorney General		1986
407.640	Registration of credit services organization	Director of Finance Division		1991
407.818	License to operate motor vehicle franchise			2010
409.808	Registration or temporary license for commodity merchant	Com-modity Futures Trading Comm'n		1985
409.850	License to act a commodity broker-dealer or commodity	Comm'r of Securi-ties	409.863 - Deny, suspend, revoke, suspend/	1985

Statute	License	Issuer	State Control	Date
409.850 Con't.	sales represen-tative		postpone effective date	
411.255	License to operate grain storage warehouse, grain bank	Ag.	411.661 - Offense of operating w/o license	1977
411.260	License required for each grain storage facility/ warehouse	Ag.	411.283, .311 - Refuse to issue, suspend, tempo-rarily suspend, revoke, cancel; offense of operating w/o license	1939
415.020	License to transact business as a public warehouse-man	Circuit court of county	415.040 - Refuse to renew, offense of operating w/o license	1939
416.490	License to operate a milk or milk products manu-facturing or processing plant	State Milk Bd; Ag.	196.590. Suspension or revocation; 416.505 - Enforce a "stop-sale"	1959

Statute	License	Issuer	State Control	Date
436.224	License to act as an athlete agent	DIFP		2004
443.706	License for mortgage loan originator	Director of Finance Division	443.729 - Deny, suspend, revoke, condition, or decline to renew	2009
443.805	License for residential mortgage loan broker		443.807, .830, .881, .891 - Enjoin violation; Refuse to issue, renew; Suspend, revoke; Fine, restitution	1994
537.630	License to association of political subdivisions for purpose of providing liability insurance	Director of DIFP		1978
590.020	License for a peace officer	Director of Public Safety Dept.	590.080-.100 - Discipline, suspend, deny application	2001

Statute	License	Issuer	State Control	Date
630.715	License to operate residential facilities and day programs	Dept. of Mental Health	630.725 - Revoke, deny application	1980
630.735	License to operate residential facility in this state for the care, treatment, habilitation or rehabilitation of mentally retarded or development ally disabled persons	Dept. of Mental Health	.630.740 - Offense of operating w/o license	1980
643.225	Certificate to engage in asbestos abatement project or inspection	DNR		1989
643.320	Certificate to operate as an official emissions inspection station	Air Conser-vation Comm'n		1994
660.403	License to operate an adult day care program	Division of Aging	660.407 - Refuse to issue, suspend,	1984

Statute	License	Issuer	State Control	Date
660.403 Con't.			revoke	
700.656	License to install manufactured homes	Public Service Comm'n	700.677 - Discipline licensee	2004
701.053	Registration for on-site sewage disposal system contractor	DHSS		1994
701.312	License as lead inspector	DHSS		1993

Statute	License	Issuer	State control	Date
42.127	License to operate facility as a Missouri veterans' home	MO Vet. Comm'n		1989
64.470	License to operate disposal area (dump)	County Comm'n		1955
67.275	License for electrical contractor	City/ County		2004
67.1263	License to do business as association providing health care insurance for county prisoners	(DIFP)		1998
67.1809	License and regulate taxicab companies in St. Louis region	Reg'l Taxicab Comm'n		2005

AMICUS CURIAE BRIEF

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CHAMBER OF COMMERCE OF THE UNITED STATES, ET AL., PETITIONERS,

v.

MICHAEL B. WHITING, ET AL., RESPONDENTS.

On Writ Of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF FOR NATIONAL IMMIGRANT JUSTICE CENTER, AMERICAN IMMIGRATION LAWYERS ASSOCIATION, AND AMERICAN IMMIGRATION COUNCIL AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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QUESTIONS PRESENTED

1. Whether an Arizona statute that imposes sanctions on employers who hire unauthorized aliens is invalid under a federal statute that expressly "preempt[s] any State or local law imposing civil or criminal sanctions (other than through licensing and similar laws) upon those who employ, or recruit or refer for a fee for employment, unauthorized aliens." 8 U.S.C. § 1324a(h)(2).

2. Whether the Arizona statute, which requires all employers to participate in a federal electronic employment verification system, is preempted by a federal law that specifically makes that system voluntary. 8 U.S.C. § 1324a note.

3. Whether the Arizona statute is impliedly preempted because it undermines the "comprehensive scheme" that Congress created to regulate the employment of aliens. *Hoffman Plastic Compounds, Inc.* v. *NLRB*, 535 U.S. 137, 147 (2002).

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Medtronic, Inc. v. *Lohr*, 518 U.S. 470 (1996) 25

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H.R. Conf. Rep. No. 99-1000 (1986), *reprinted in* 1986 U.S.C.C.A.N. 5840 9

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Hiroshi Motomura, *The Rights of Others: Legal Claims and Immigration Outside the Law*, 59 DUKE L. J. 1723 (2010) 17

S. Rep. No. 99-132.....9

Statement of the President, *reprinted in* 1986 U.S.C.C.A.N. 5856.....10

USCIS, Employment Eligibility Verification, Form I-9 (Rev. May 31, 2005) 18

USCIS, M-274 Handbook for Employers: Instructions for Completing Form I-9 (Rev. 04/03/09), available at http://www.uscis.gov/files/nativedocuments/m-274.pdf.....7

USCIS, Worksite Enforcement, Guide to Administrative Form I-9 Inspections and Civil Monetary Penalties (Nov. 25, 2008).....7

INTRODUCTION AND INTERESTS OF *AMICI CURIAE*

The National Immigrant Justice Center, the American Immigration Lawyers Association, and the American Immigration Council respectfully submit this brief *amicus curiae* to provide a practitioner's perspective on the federal immigration laws as they relate to the employment of noncitizens.[1] From their vantage point in the trenches of immigration law, *amici* and their members are in a unique position to provide insight into the complexity of this federal regulatory scheme. That complexity is the product of a delicate balancing act by Congress with respect to a series of often-conflicting federal concerns—advancing an effective immigration policy, preventing racial and ethnic discrimination, avoiding burdens on commerce, and ensuring due process, to name a few. Appreciating this complexity is a critical step in assessing the extent to which Congress has preempted state intrusion into its uniform and comprehensive scheme of regulation—and the burdens employers, employees, and practitioners will face if States are permitted to adopt their own competing regulatory schemes.

The National Immigrant Justice Center ("NIJC") is a program of the Heartland Alliance for Human Needs and Human Rights, a non-profit corporation headquartered in Chicago, Illinois. NIJC works to

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1 Counsel for all parties have consented to the filing of this brief. Letters evidencing consent are on file with the Clerk. No party or counsel for a party authored this brief in whole or in part, and no person or entity other than Amici and their counsel has made a monetary contribution to the preparation or filing of this brief.

ensure human rights protections and access to justice for all immigrants, refugees, and asylum seekers. By partnering with more than 1,000 attorneys from the nation's leading law firms, NIJC provides direct legal services to approximately 10,000 individuals annually, including in applications for and consultations regarding employment authorization.

The American Immigration Lawyers Association ("AILA") is the national association of over 11,000 attorneys and law professors who practice and teach immigration law. AILA member attorneys represent U.S. families seeking permanent residence for close family members, as well as U.S. businesses seeking talent from the global marketplace. AILA members also represent foreign students, entertainers, athletes, and asylum seekers, often on a *pro bono* basis. Founded in 1946, AILA is a nonpartisan, not-for-profit organization that provides continuing legal education, information, professional services, and expertise through its 36 chapters and over 50 national committees. AILA's mission is to promote justice, advocate for fair and reasonable immigration law and policy, advance the quality of immigration and nationality law and practice, and enhance the professional development of its members.

The American Immigration Council ("AIC") (formerly the American Immigration Law Foundation) was established in 1987 as a not-for-profit educational and charitable organization. The mission of the AIC is to strengthen America by honoring our immigrant history and shaping how Americans think and act toward immigration now and in the future. The AIC exists to promote the prosperity and cultural richness of our diverse nation by educating citizens about the enduring

contributions of America's immigrants; standing up for sensible and humane immigration policies that reflect American values; insisting that our immigration laws be enacted and implemented in a way that honors fundamental constitutional and human rights; and working to achieve justice and fairness for immigrants under the law. The AIC's Legal Action Center works to advance fundamental fairness in U.S. immigration law and to protect the constitutional and legal rights of immigrants, refugees, and other noncitizens. To this end, the Center engages in impact litigation and appears as *amicus curiae* before administrative tribunals and federal courts in significant immigration cases on targeted legal issues. The Center also provides resources to lawyers litigating immigration cases and serves as a point of contact for lawyers conducting or contemplating immigration litigation. Working with other immigrants' rights organizations and immigration attorneys across the United States, the Center strives to promote the just and fair administration of our immigration laws.

Amici have a substantial interest in the issue now before the Court, both as advocates for the rights of immigrants generally and as the representatives of practitioners in the field. Given their experience and perspective, *Amici* are well-situated to assist the Court in understanding how this complex and intricate system of federal regulation actually operates and what burdens it necessarily imposes on employers, employees, and practitioners. To minimize those burdens—and to ensure the effectiveness of its policies—Congress intended its system to be both uniform and comprehensive. Those purposes and policies would be frustrated and the system

fundamentally disrupted if Arizona and other States were allowed to enter the arena with their own, competing systems of employment-related immigration law.

To be sure, the statutory provision preempting state and local sanctions in this area allows the states to retain their traditional ability to police the *licensing* of certain professions and activities. But that provision does not purport to allow the States to use the guise of "licensing" as a basis for a competing system of regulation or enforcement. Indeed, as explained in detail below, the Arizona scheme is preempted because of its conflict with the fundamental purposes of the federal system.

SUMMARY OF ARGUMENT

A close review of the elaborate process for verifying a noncitizen's authorization to work[2]—including the administrative structure for compliance, enforcement, and adjudication—reveals a robust and comprehensive federal scheme that is an integral part of federal immigration law and policy. Located in the Immigration and Nationality Act ("INA")—the overarching federal immigration law—this scheme originates in the Immigration Reform

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2 One aspect of this scheme is the voluntary E-Verify program, which allows employers to supplement the ordinary "I-9" verification process with an Internet-based verification system. IIRIRA § 403. But all employers still must complete the I-9 form, even if they supplement the process using E-Verify. *Id.* § 403(a)(1). In this brief, *Amici* will focus their attention only on the I-9 process. Petitioners and others more thoroughly address the E-Verify program and the implications of Arizona's approach to that issue.

and Control Act ("IRCA") and the Illegal Immigration Reform and Immigrant Responsibility Act ("IIRIRA"), codified at 8 U.S.C. § 1324a, and has come to include an array of regulations, federal officers, and federal agencies. Employers and employees alike are bound by a set of intricately detailed rules and procedures, carefully crafted to serve the goals of federal immigration policy while also preventing racial and national origin discrimination, minimizing the burdens on commerce, and ensuring due process. The details of this system—as well as a sampling of some of the difficult problems employers and employees face under this regime—are described below. When considered in combination with the statutory language of IRCA and well-established principles of preemption, the realities of the I-9 system and the larger federal scheme lead to the inevitable conclusion that immigration-related employment law is, and must be, a uniquely federal concern.

To that end, Congress has expressly prohibited state and local governments from imposing their own sanctions on the employment of unauthorized workers, other than "through licensing and similar laws." Given the breadth of Congress's action in this area, that exception must be read narrowly, consistent with its language and (literally) parenthetical nature. It cannot be understood as a broad authorization for States to adopt their own competing regulatory schemes under the guise of "licensing."

Even if Arizona's law could properly be considered a "licensing" scheme, however, it would remain preempted. This Court has explained that even when an express preemption provision exists—and even when it contains a limited saving clause—"ordinary

pre-emption principles [still] apply." *Geier* v. *Am. Honda Motor Co.*, 529 U.S. 861, 869-870 (2000). "[T]he saving clause (like the express preemption provision) does *not* bar the ordinary working of conflict pre-emption principles." *Id.* at 869 (emphasis in original). Moreover, the presence of a "unique federal concern changes what would otherwise be a conflict that cannot produce pre-emption into one that can." *Boyle* v. *United Techs. Corp.*, 487 U.S. 500, 508 (1988).

Congress's purposes here included ensuring a system of immigration-related employment law that remains "uniform[]" across the nation. IRCA § 115, 100 Stat. at 3384. Indeed, that uniformity is critical to the system's fairness to immigrants and employers, as well as to the goals of preventing discrimination and minimizing burdens on commerce. Together, the comprehensive nature of this federal scheme and the stated goal of uniformity manifest Congress's intent to preempt state laws establishing different systems of regulation and enforcement, whether those systems are intended to replace the federal scheme or merely to supplement it. *Amici* urge this Court to reverse the Ninth Circuit's decision and hold that Arizona's law is unconstitutional.

ARGUMENT

I. The federal scheme's complexity and deliberate uniformity reflects a careful and ongoing effort to balance competing concerns.

A. IRCA's regulatory scheme is delicately balanced to accommodate multiple, sometimes competing, federal interests.

The prospect of employment is frequently the magnet that draws an undocumented immigrant to the United States. Accordingly, as this Court has recognized, Congress adopted IRCA as a "comprehensive scheme" that "'forcefully' made combating the employment of illegal aliens central to '[t]he policy of immigration law.'" *Hoffman Plastic Compounds, Inc.* v. *NLRB*, 535 U.S. 137, 147 (2002) (quoting *INS* v. *National Center for Immigrants' Rights, Inc.*, 502 U.S. 183, 194 n.8 (1991)).[3]

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3 The federal agencies' own materials underscore this focus. The introduction to the United States Citizenship and Immigration Services ("USCIS") M-274 Handbook for Employers explains that employers must verify employment authorization and identity of new employees because "[e]mployment is often the magnet that attracts individuals to reside in the United States illegally. The purpose of the employer sanctions law is to remove this magnet." USCIS, M-274 Handbook for Employers: Instructions for Completing Form I-9 (Rev. 04/03/09), available at http://www.uscis.gov/files/nativedocuments/m-274.pdf; see also USCIS, Worksite Enforcement, Guide to Administrative Form I-9 Inspections and Civil Monetary Penalties (Nov. 25, 2008), at 4 ("The purpose of [IRCA] was to reduce the magnet of employment in the United States *thereby reducing the level of illegal immigration.*") (emphasis added).

Through IRCA, Congress sought to limit the employment of unauthorized workers by regulating employers directly. IRCA subjects employers to a series of graduated sanctions if they knowingly employ unauthorized workers or retain such workers after learning that their work authorization had expired. H.R. REP. 99-682(1), H.R. REP. 99-682, H.R. Rep. No. 682(1), 99th Cong., 2nd Sess. 1986, *reprinted in* 1986 U.S.C.C.A.N. 5649, 5650.

Congress entered this area of regulation with an acute concern that regulating the employment of noncitizens may lead to discrimination on the basis of race, ethnicity, and national origin. Many witnesses during the congressional hearings expressed the view "that employers, faced with the possibility of civil and criminal penalties, will be extremely reluctant to hire persons because of their linguistic or physical characteristics." 1986 U.S.C.C.A.N. at 5672. To assuage these fears, a compromise was forged to minimize discrimination by providing "substantial protections against discrimination in the form of a uniform verification process for all new hires and extensive monitoring and reporting requirements on the discrimination issue." *Id.* at 5672-73. With narrow exemptions, the final statutory scheme makes it an unfair immigration-related employment practice to discriminate with respect to hiring, firing, recruitment, or referral for a fee based on national origin or citizenship status. See 8 U.S.C. § 1324b(1). IRCA also provides U.S. citizens and other "protected individuals" (including certain categories of noncitizens) the right to challenge discriminatory hiring practices based on citizenship or noncitizenship status. See *id.* §§ 1324b(1) and (3).

Another critical concern was the potential cost to the employer. Accordingly, Congress endeavored to create a system that was "the least disruptive to the American businessman." H.R. Rep. No. 99-682(I), at 56, 1986 U.S.C.C.A.N. at 5660; S. Rep. No. 99-132, at 8-9; see *Collins Foods Int'l, Inc.*, v. *INS*, 948 F.2d 549, 554 (9th Cir. 1991) ("the legislative history of section 1324a indicates that Congress intended to minimize the burden and the risk placed on the employer in the verification process"). Congress expressed particular concern that the law not impose excessive burdens on small businesses or for isolated violations. See, *e.g.*, H.R. Conf. Rep. No. 99-1000, at 86 (1986), *reprinted in* 1986 U.S.C.C.A.N. 5840, 5841; S. Rep. No. 99-132 at 32.

In short, as even the Ninth Circuit has recognized, IRCA represents "a carefully crafted political compromise which at every level balances specifically chosen measures discouraging illegal employment with measures to protect those who might be adversely affected." *Nat'l Ctr. for Immigrants' Rights, Inc.* v. *INS*, 913 F.2d 1350, 1366 (9th Cir. 1990), *rev'd on other grounds*, 502 U.S. 183 (1991).

B. IRCA's regulatory scheme is uniform and comprehensive, allowing no room for an alternative state system like Arizona's.

The uniformity and comprehensive nature of the statute and its implementing regulations reflect this delicate balance. To avoid disturbing that balance, Congress expressly intended that its system be enforced by federal authorities exclusively, in a "uniform[]" manner throughout the United States. IRCA § 115, 100 Stat. at 3384. Of particular relevance here is the I-9 process, the "keystone and

major element" of the statute. Statement of the President, 1986 U.S.C.C.A.N. at 5856-1; see *Hoffman*, 535 U.S. at 147-148. An examination of the details of this federal procedure illustrates the importance of Congress's goal of uniformity—and how a state statute like Arizona's necessarily thwarts that goal, regardless of the State's intent in adopting it.

1. The statute makes it unlawful for an employer "to hire, or to recruit or refer for a fee, for employment in the United States an alien knowing the alien is an unauthorized alien." 8 U.S.C. § 1324a(a)(1)(A). An "unauthorized alien" is defined as an "alien [who] is not at that time either (A) * * * lawfully admitted for permanent residence, or (B) authorized to be so employed by [IRCA] or the Attorney General." 8 U.S.C. § 1324(a)(3). "Federal law exhaustively details a specialized administrative scheme for determining whether an employer has knowingly employed an unauthorized alien," subject to a range of civil and criminal penalties, cease and desist orders, and imprisonment. *Chamber of Commerce* v. *Edmondson*, 594 F.3d 742, 751 (10th Cir. 2010) (citing 8 U.S.C. § 1324a(e) and (f)).

Employers discharge their responsibilities under this section by completing an I-9 form for every employee and inspecting documents that establish the employee's identity and eligibility to work within three days of being hired. 8 C.F.R. § 274a.2(b). The prospective employee must present documents that establish his employment authorization and identity, 8 U.S.C. § 1324a(b)(1)(B), (C), (D), and must attest under penalty of perjury that he is authorized to work, *id.* § 1324a(b)(2).[4] Employees are under no

[4] Federal law further delves into such specific problems as lost verification documents, 8 C.F.R. § 274a.2(b)(1)(vi);

obligation to present any particular document on the list, nor may employers ask them to do so. *Id.*; 8 C.F.R. § 274a.2(b)(1)(ii)(A), (v). The law creates a substantial safe harbor for employers who "compl[y] in good faith" with the I-9 form's requirements. 8 U.S.C. § 1324a(a)(3).

Congress has more than once revisited the subject of document-based verification in order to further refine the federal system and best effectuate its goals. Thus, in 1990, Congress prohibited employers from requesting more or different documents than those the employee chooses to present. See Immigration Act of 1990, Pub. L. No. 101-649, § 535, 104 Stat. 4978, 5055 (codified at 8 U.S.C. § 1324b(a)(6)). In other words, if an employee produces an item on the federal government's list of acceptable documents, the employer *must* accept it, as long as it "reasonably appears on its face to be genuine." *Id.* § 1324a(b)(1)(A). This was done to prevent employers from using such requests as an avenue for discrimination. In 1996, Congress refined this provision, specifying that such conduct would be treated as discriminatory only if it was done "for the purpose or with the intent of discriminating." IIRIRA, Pub. L. No. 104-208, tit. IV, subtit. C, § 421, 110 Stat. 3009-546, 3009-670. There have been other refinements as well. See, *e.g.*, Immigration Act of 1990, Pub. L. No. 101-649, 104 Stat. 4978 (restructuring the system for admitting legal

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expired employment verification, id. § 274a.2(b)(1)(vii); verifying work authorization after changes in employment status, id. § 274a.2(b)(1)(viii); and verifying the status of a previous employee, id. § 274a.2(c). It even specifies how long and in what manner employers must retain I-9 forms. 8 U.S.C. § 1324a(b)(3); 8 C.F.R. § 274a.2(b)(2), (e).

immigrants, and adding penalties related to fraudulent documents).

Congress also regulated the manner in which the substance and process of work authorization enforcement could be changed. It required ongoing study and specified procedures to be followed before aspects of the work authorization process may be modified. It mandated ongoing reports about the implementation of § 1324a. See IRCA § 402, 100 Stat. at 3441 (codified in 8 U.S.C. § 1324a note). Further, the President is required to monitor the effectiveness of the verification system and to transmit to designated House and Senate committees written reports of proposed changes well in advance of their effective date, 8 U.S.C. § 1324a(d)(1)(A), (d)(3), which trigger mandatory congressional hearings under certain circumstances, *id.* § 1324a(d)(3)(C). Obviously, this system does not contemplate having state-specific enhancements enacted by state legislatures, without notice to or oversight by Congress.

2. Federal law defines in exquisite detail who is authorized to work, see, *e.g.*, 8 C.F.R. § 274a.12, and the manner in which every employer in the country must verify the work authorization for each prospective employee. Notably, Congress's scheme does not determine "employment authorization" or "employment eligibility" solely by reference to the individual's "citizenship or immigration status." See 66 Fed. Reg. 46812, 46815 (Sept. 7, 2001); see also 8 U.S.C. 1254a (distinguishing between "immigration status" and "work authorization"); 8 C.F.R. pt. 274a, subpt. B (addressing "Employment Authorization"); 73 Fed. Reg. 75446, 75448 (Dec. 11, 2008) (same). While some types of immigration status imply

employment eligibility, see, *e.g.*, 8 C.F.R. § 274a.12(a), other forms of lawful immigration status (such as visitor visas) are incompatible with employment. 8 C.F.R. § 214.1(e). Moreover, lack of lawful immigration status does not imply lack of work authorization. An individual may be authorized to work under IRCA independent of her specific "immigrant" status. See, *e.g.*, 8 C.F.R. § 274a.12(c)(8) (asylum applicants), (c)(9) (applications for adjustment of status), (c)(18) (individuals ordered deported where deportation cannot be effectuated).

Congress's chosen method of defining whether a particular noncitizen can work is one of the building blocks of the federal system. Yet this basic issue also illustrates the confusion and burdens generated when another sovereign—here, the State of Arizona—enters the area with its own system for immigration-related employment regulation and enforcement.

Under the Arizona statute, "the federal government's determination" creates only "a *rebuttable presumption* of the employee's lawful status." Ariz. Rev. Stat. § 23-212(H) (emphasis added). Moreover, the Arizona statute conflates employment eligibility with the wholly separate question of citizenship or immigration status. As Petitioner has explained, the Arizona statute's definition of work authorization is inexplicably tied to 8 U.S.C. § 1373(c), which relates to "citizenship or immigration status" instead of "employment authorization" or "employment eligibility." Ariz. Rev. Stat. § 23-212(H); see Pet. Br. 41.[5] Even with respect

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5 Under the Arizona statute, an employee's eligibility to work would be determined solely by his lawful status. Ariz. Rev. Stat. §§ 23-212(H). For example, in the case of an asylum applicant, whose lawful status (but not his

to this basic matter, then, Arizona's entry into this area of regulation creates confusion and directly conflicts with the various federal regulations facing employees and employers in that State.

3. Federal law creates a detailed array of allowances and exceptions for individuals wishing to work in the United States, see, *e.g.*, 8 C.F.R. § 274a.12, and it vests federal agencies with exclusive authority to administer these requirements, including components of the Departments of State, Labor, Homeland Security ("DHS"), and Justice ("DOJ").[6] Jurisdiction for determining whether an employer knowingly hired an unauthorized worker is vested in a specialized federal administrative review system, which affords employers the right to an adversarial hearing before a federal Administrative Law Judge ("ALJ").

Further, federal law sets, and limits, the appropriate prohibitions and sanctions on employers. It forbids an employer from hiring a noncitizen knowing he is unauthorized to work, or without

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work authorization) has expired, an employer could only escape liability under the Arizona statute by mounting an affirmative defense of good faith. *Id.* § 23-212(J). Arizona places the burden of proof on a defendant as to affirmative defenses. *Id.* § 13-205(A). Arizona's scheme differs significantly from the federal law, which is governed only by the individual's work authorization, not by his legal status as a noncitizen present in the country, as explained above, and does not require the employer to prove its innocence to escape liability.

6 See, e.g., 6 U.S.C. §§ 236, 271 et seq.; 8 U.S.C. §§ 1103(a), 1103(g), 1151, 1153, 1182(a)(5), 1201; 8 C.F.R. § 274a.12; *id.* pt. 1003; 20 C.F.R. pts. 655, 656.

complying with the I-9 process. 8 U.S.C. § 1324a(a)(1)(A), (B). It also provides a defense to liability to employers who comply in good faith with the I-9 process. *Id.* § 1324a(a)(3); 8 C.F.R. § 274a.4. Determining whether an employer knowingly hired an unauthorized worker is committed to a specialized federal administrative review system, which permits complaints to be filed and gives federal officials substantial discretion to determine which violations to pursue. 8 U.S.C. § 1324a(e)(1); 8 C.F.R. § 274a.9.

If the federal government decides to pursue a suspected violation, every aspect of the resulting proceeding is detailed in extensive provisions—everything from the manner in which the proceeding is commenced (via a "Notice of Intent to Fine") to the required method of serving such a notice. The federal statutes and regulations even specify the rules of procedure, which in certain ways mirror federal court proceedings, including the right to an adversarial hearing before a federal ALJ and placing the burden of proof on the government. 8 U.S.C. § 1324a(e); 8 C.F.R. § 274a.9; 28 C.F.R. pt. 68. At the end of this process, IRCA and its regulations carefully set civil and criminal sanctions for violations, including calibrated and graduated monetary penalties, fines, and civil injunctions against repeat offenders. 8 U.S.C. § 1324a(e)(4), (f); 8 C.F.R. § 274a.10(b). The ALJ's decision is subject to administrative appeal, then federal judicial review. 8 U.S.C. § 1324a(e)(7), (8).

In setting forth these detailed enforcement provisions—and vesting exclusive jurisdiction with the various federal agencies—Congress left no room for another sovereign to create its own system of enforcement. To the contrary, Congress expressly

preempted "any State or local law imposing civil or criminal sanctions" with respect to the employment of unauthorized aliens, parenthetically carving out only those sanctions based on "licensing and similar laws." 8 U.S.C. § 1324a(h)(2). As discussed further below and in the Petitioners' brief, Congress did not authorize—nor can the parenthetical saving clause be read as authorizing—an alternative state system of adjudication and enforcement.

Uniformity in enforcement is no less important than uniformity in the regulations themselves. In Arizona, for example, as noted above, if the federal government determines that an employee is authorized to work, that determination creates only a "rebuttable presumption" for purposes of the Arizona statute. Ariz. Rev. Stat. § 23-212(H). As Petitioners have explained, this provision flatly contradicts the federal statutory provisions that place the power to determine work authorization exclusively with federal officials. Pet. Br. 40. Moreover, if the federal determination is merely a rebuttable presumption, there will inevitably be situations where the federal and state determinations conflict, placing both employees and employers in an untenable situation.

When a federal statute seeks to create a uniform system, difficulties arise when dueling sovereigns act as unrelated decision-makers who may not approach issues consistently. Even if a State intends its laws only as a *complement* to the federal enforcement regime, the fundamental conflict remains. "The fact of a common end hardly neutralizes conflicting means." *Crosby* v. *Nat'l Foreign Trade Council*, 530 U.S. 363, 379 (2000). Indeed, one possible result of parallel enforcement is that "state and local laws would *overenforce* federal immigration law." Hiroshi

Motomura, *The Rights of Others: Legal Claims and Immigration Outside the Law*, 59 DUKE L. J. 1723, 1740 (2010) (case citations omitted) (emphasis added). The "facets of immigration law enforcement reflect complex, highly discretionary choices. It matters who allocates resources and picks enforcement targets and who balances enforcement goals against competing concerns." *Id.* at 1742-43. Congress's approach to these important and competing concerns—chiefly, serving immigration policy while preventing discrimination and minimizing burdens on business—is reflected not only in the statute itself but also in its careful delegation of the regulatory and enforcement functions to federal agencies; "law in the sense in which courts speak of it today does not exist without some definite authority behind it," *Erie R. Co.* v. *Tompkins*, 304 U.S. 64, 79 (1938), and discretionary enforcement choices are part and parcel of the exclusive federal scheme that governs this matter. Any parallel enforcement scheme would necessarily undermine Congress's goals.

C. IRCA's regulatory scheme is exceedingly complicated, underscoring the need to maintain exclusive federal control.

Complying with the federal system is no easy task. Indeed, the system is a maze of statutory provisions and regulations, described in federally issued handbooks and enforcement guides that are often themselves unable to capture the system's full complexity. While this complexity may be a necessary outgrowth of Congress's careful balancing act in this arena, it nevertheless poses challenges for employers, employees, and practitioners. Throwing state-specific regulations into the mix would greatly magnify

challenges like these, thus undermining Congress's express goals of ensuring uniformity and minimizing the burden on American business.

1. Government publications concerning the I-9 process acknowledge the difficulties employers and practitioners face. On May 31, 2005, the United States Citizenship and Immigration Services ("USCIS"), a division of DHS which inherited some of the functions of the former Immigration and Naturalization Service ("INS") under the 2003 Homeland Security Act, published a non-substantive revision of the I-9 form accompanied by instructions carrying both a prominent Anti-Discrimination Notice and strong warnings against violating employee civil rights in the employment eligibility verification process. The Reporting Burden note in the revised instructions acknowledges the difficulty of producing "forms and instructions that are accurate, can be easily understood and which impose the least possible burden on [the employer] to provide [DHS] with information * * * because *some immigration laws are very complex.*" DHS, USCIS, Employment Eligibility Verification, Form I-9 (Rev. May 31, 2005) (emphasis added).

The uniform enforcement mechanisms of the federal system also reflect the system's complexity. To enforce IRCA, Congress created a new administrative court—the Office of the Chief Administrative Hearing Officer ("OCAHO") within the DOJ Executive Office for Immigration Review—to conduct *de novo* hearings in response to employer appeals from proposed civil money penalties levied by INS/DHS for knowing hiring and I-9 infractions, and to conduct *de novo* hearings on complaints of unlawful immigration-related discrimination brought

by the Special Counsel and/or aggrieved individuals or their representatives. These specialized tribunals apply their expertise to enforce the regulations consistently in cases throughout the country. That experience is critical not only to understanding the requirements employers face but even to determining whether a particular employee is authorized to work in the first place.

2. As noted above, even the most basic issues relating to work authorization are incredibly complex for immigrants, employers, and practitioners alike. Take, for example, the original INS rule published in 1987 to implement IRCA, which described the circumstances under which aliens would be authorized to work in the United States, and what kind of documentation would be needed to evidence particular forms of alien work authorization. There were 11 subcategories of aliens authorized to work "incident to status," 15 subcategories of aliens authorized to work *only for a particular* employer "incident to status," and 15 subcategories of aliens who were not work-authorized incident to status unless they were in possession of a work authorization document consistent with the requirements of the rules. See Appendix hereto, detailing the INS Rule, published May 1, 1987 at 52 Fed. Reg. 16216. That rule has been updated and amended through the agency rulemaking process over the years, see, *e.g.*, 60 Fed. Reg. 32472-01, 64 Fed. Reg. 6187-01, 72 Fed. Reg. 65974-01, 73 Fed. Reg. 76505-01, but the complexity of the various subcategories endures.

Under the federal system, an employer complies with its obligations not to employ an unauthorized worker simply by complying in good faith with the I-9

process. When, upon physical examination, the documents appear to the employer to be genuine and to relate to the individual, the employer must not look behind the documents to determine and understand the nature, circumstances, and extent of a particular employee's authorization to work. 8 U.S.C. § 1324a(b)(1)(A), 8 C.F.R. § 274a.2(b)(1)(ii)(A), (v).[7] In that fashion, the federal system endeavors to limit its burden on American business—as well as to prevent discrimination in employment.

But when a system like Arizona's is layered on top of this scheme, good-faith compliance with the I-9 process may no longer be sufficient. Ariz. Rev. Stat. §§ 23-212, 23-212.01. An employer may find itself defending its employment decisions in an enforcement proceeding where the employee's authorization to work under the above categories is ultimately adjudicated by *state* officials—perhaps consistently, and perhaps not, with how federal officials would resolve that issue. The employee himself may be long gone (or in federal custody), thus further complicating the employer's defense. To understand these issues, ask the necessary questions, and mount the necessary defense—all without running afoul of the anti-discrimination provisions of IRCA—would be incredibly difficult for any employer. This result is not consistent with Congress's goal of pursuing immigration policy with minimal burden on American business.

3. As noted above, determining work authorization is complex simply due to many

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[7] However, an employer might have duties to investigate if the facts would place a reasonable person on notice that the worker's identity and/or work authorized status are in issue.

different categories of work authorization, and the different types of documentation required for each. See Appendix hereto; 8 C.F.R. § 274a.2(b)(1)(v); 52 Fed. Reg. 16216, at 16222 (1987). In addition, within particular classes there are further complexities, some of which are not evident on the face of the regulations.

One example lies in the federal agencies' handling of the work authorization rules governing foreign nationals accorded Temporary Protected Status ("TPS") under the Immigration Act of 1990. See 8 U.S.C. § 1254 *et seq.* Because TPS is country-specific (generally relating to natural disasters or political unrest in the country) and may involve tens or even hundreds of thousands of applications filed by nationals of a country within a short span of time, DHS has often issued a blanket extension of work authorization by publication in the Federal Register, rather than on an individual basis. In these cases, relying solely on the government-issued work authorization documents the employee presents may result in an employer's refusing to employ someone who does, in fact, have authorization to work.

Between 1999 and 2008, INS and DHS provided extension notices for TPS work authorization by Federal Register publication with respect to individuals from a variety of nations in Latin America. See, *e.g.*, Automatic Extension Notices of Temporary Protected Status and Work Authorization Status for registered nationals of El Salvador (71 Fed. Reg. 34637 (June 15, 2006), 68 Fed. Reg. 42071 (Jul. 16, 2003), 67 Fed. Reg. 46000 (Jul. 11, 2002)), Honduras (73 Fed. Reg. 57133 (Oct. 1, 2008), 69 Fed. Reg. 64084 (Nov. 3, 2004), 68 Fed. Reg. 23744 (May 5, 2003), 66 Fed. Reg. 23269 (May 8, 2001), 65 Fed. Reg.

36719 (June 9, 2000), 65 Fed. Reg. 30438 (May 71, 2000), 64 Fed. Reg. 524 (Jan. 5, 1999)), and Nicaragua (68 Fed. Reg. 23748 (May 5, 2003), 66 Fed. Reg. 23271 (May 8, 2001), 65 Fed. Reg. 30440 (May 71, 2000), 64 Fed. Reg. 526 (Jan. 5, 1999)). At various times, similar status and similar extensions were provided to individuals from Burundi, Somalia, Yugoslavia, Bosnia, and Liberia, among other nations. Typically, these notices state that employers were prohibited from refusing to accept INS or DHS employment authorization documents (Form I-688B) that bore a specified expiration date (or extension sticker punched for a specified expiration date) and contained the notation "274a.12(a)(11)" or "274a.12(a)(12)" on the face of the document under "Provision of Law," until the expiration date of the extension provided in the Federal Register.

Staying abreast of these developments is no easy task. And if employers face a state regulatory system as well, both the employers *and* the state regulators must remain conversant in the details of the Federal Register. Moreover, the employer may be forced to monitor the processes and decisionmaking of *state* enforcement bodies as well as federal ones, given that the state regulators' approach to this and other complex issues may, or may not, mirror the decisionmaking of the relevant federal agencies.

4. Yet another area of complexity arises in the context of students. Foreign students studying in the United States under F-1 visas can engage in Optional Practical Training ("OPT") and Curricular Practical Training ("CPT"). 8 C.F.R. § 214.2(f)(10). These work authorizations allow a student to work temporarily in a job related to his or her field of study. DHS requires all schools authorized to accept international

students to be approved by ICE's Student and Exchange Visitor Program ("SEVP"), and employment is authorized in different ways, some documented with an employment authorization document, and some simply notated by the school's Designated School Official ("DSO") in the Student and Exchange Visitor Information System ("SEVIS"). The federal government delegates certain authority to a DSO to authorize employment without prior DHS approval (as with on-campus employment and CPT). Even when there has been a violation of student status, the DSO can recommend and DHS can authorize reinstatement of status, which eliminates the previous violation. 8 C.F.R. § 214.2(f)(16).

For CPT employment authorization, a DSO must update a student's record in SEVIS and complete a SEVIS Form I-20 prior to the student's commencement of employment. 8 C.F.R. § 214.2(f)(10)(i)(B). For OPT employment authorization, students must apply for and receive a Form I-766 authorization document before beginning work. *Id.* § 214.2(f)(10)(ii). Generally, a student's lawful status remains current so long as he or she remains enrolled in school; if a student drops out of school, he may cease to be in lawful status, while retaining a genuine work authorization document that any employer may accept as permitting employment. There are separate categories for limited "on-campus" employment, as well as off-campus employment if the student can demonstrate severe economic hardship, but such categories are subject to yet another set of rules and procedures. 8 C.F.R. § 214.2(f)(9). During so-called "post-completion OPT"—which occurs after graduation—

students with a science, technology, engineering or mathematics ("STEM") degree may remain in the United States during OPT employment for 17 to 29 months after completing their studies. For such graduates, lawful status under the F-1 visa is "dependent upon employment," 8 C.F.R. § 214.2(f)(10)(2)(C)-(E), so the fact of employment actually drives lawful status, not the other way around. Accordingly, a person in this category who is inappropriately discharged by an Arizona employer may be required to return home, notwithstanding Congress's determination that the presence of such individuals benefits the United States.

In this context, subjecting employers and students to state regulation as well as federal regulation would impose additional burdens and interfere with the purposes underlying the federal scheme. The federal scheme balances multiple interests, including the cultural and educational benefits of welcoming foreign students to the United States, as well as the goodwill and economic benefit these workers offer to our nation as it strives to remain competitive in a global economy. Indeed, given the value of their particular skills to the U.S. economy, it is no coincidence that students in science, technology, engineering, and mathematics may extend their post-completion OPT more easily than students in other fields. Here again, attempts by States to impose their own regulations on this complex and comprehensive student employment process would only serve to interfere with federal objectives.

5. In sum, Congress has expressed a desire to serve its immigration policy goals while also preventing discrimination and avoiding burdens on business, and the uniformity of its regulation plays

an important part in that effort. Employers, employees, and practitioners alike currently maneuver through these complicated waters under the auspices of a single federal sovereign. But the carefully crafted federal body of regulation would quickly descend into imbalance and chaos if fifty-one independent sovereigns were each permitted to disrupt the existing system with widely varying systems and priorities of their own. With that in mind, it is no surprise that Congress intended to preempt those state regulatory efforts.

II. Principles of implied preemption apply here, notwithstanding the express statutory preemption provision and the limited saving clause.

For the reasons explained here and in Petitioners' brief, federal law preempts Arizona's statute, whether or not it fits within IRCA's very limited saving clause. Congress's express goal of uniformity—coupled with the complexity and comprehensive nature of this scheme—manifests its intention to preempt *any* competing state regulatory or enforcement scheme, whether the state scheme supplants or merely supplements the federal scheme.

"[T]he purpose of Congress is the ultimate touchstone in every pre-emption case." *Medtronic, Inc.* v. *Lohr*, 518 U.S. 470, 485 (1996) (citations omitted); see also *Gade* v. *Nat'l Solid Wastes Mgmt. Ass'n*, 505 U.S. 89, 115-116 (1992) (Souter, J., dissenting, joined by Blackmun, Stevens, and Thomas, J.J.) ("[W]hether the pre-emption at issue is described as occupation of each narrow field in which a federal standard has been promulgated, as pre-emption of those regulations that conflict with the

federal objective of single regulation, or * * * as express pre-emption, the key is congressional intent") (citation omitted).

The fact that Congress expressly reserved certain powers to the States does not compel the conclusion that the States' power in that sphere is unlimited. To the contrary, as this Court recognized in *Geier*, 529 U.S. at 871, "ordinary conflict pre-emption principles" apply notwithstanding the presence of an express preemption provision with a saving clause. And "this Court has repeatedly 'decline[d] to give broad effect to saving clauses where doing so would upset the careful regulatory scheme established by federal law.'" *Id.* at 870 (quoting *United States* v. *Locke*, 529 U.S. 89, 106-107 (2000)) (internal citations omitted).[8]

Nor is there a "presumption against preemption" in this context, as the Ninth Circuit erroneously concluded. *Chicanos Por La Cause, Inc.*, v. *Napolitano*, 558 F.3d 856, 864 (9th Cir. 2009), *cert granted*, 130 S. Ct. 3498 (2010) (No. 09-115). This Court in *Geier* "specifically rejected the argument * * * * that the 'presumption against pre-emption' is relevant to the conflict pre-emption analysis." *Wyeth* v. *Levine*, 129 S. Ct. 1187, 1228 (2009) (Alito, J., dissenting, joined by Roberts, C.J., and Scalia, J.).

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8 Cf. *Shaw* v. *Delta Air Lines, Inc.*, 463 U.S. 85, 99 n.20, 104-06 (1983) (concluding that ERISA's broad preemptive language and legislative history manifested an intention to ensure substantial national uniformity, despite very limited exceptions to preemption written into the ERISA statute; "the combination of Congress' enactment of an all-inclusive pre-emption provision and its enumeration of narrow, specific exceptions to that provision makes us reluctant to expand § 514(d) into a more general saving clause").

Moreover, the presumption does not apply "when the State regulates in an area where there has been a history of significant federal presence." *Locke*, 529 U.S. at 108; *cf. Boyle* v. *United Techs. Corp.*, 487 U.S. 500, 508 (1988) ("unique federal concern changes what would otherwise be a conflict that cannot produce pre-emption into one that can").

This Court has found implied conflict preemption both "where it is 'impossible for a private party to comply with both state and federal requirements'" *and* "where state law 'stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.'" *Sprietsma* v. *Mercury Marine*, 537 U.S. 51, 64-65 (2002) (citations omitted); see also *Wyeth*, 129 S. Ct. at 1219 (Alito, J., dissenting, joined by Roberts, C.J., and Scalia, J.) ("the ordinary principles of conflict pre-emption turn solely on whether a State has upset the regulatory balance struck by the federal agency;" referring favorably to *Geier*, 529 U.S. at 869, 884-85).[9]

Here, as discussed above, the clear and manifest purpose of Congress was to make "combating the employment of illegal aliens central to '[t]he policy of immigration law.'" *Hoffman*, 535 U.S. at 147 (quoting *National Center for Immigrants' Rights*, 502 U.S. at 194 n.8). At the same time, Congress sought to

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9 Justice Alito's dissent in *Wyeth* also reiterated *Geier*'s conclusion that "'[t]he saving clause * * * does not bar the ordinary working of conflict pre-emption principles'" and that "'[t]he Court has * * * refused to read general 'saving' provisions to tolerate actual conflict both in cases involving impossibility and in 'frustration-of-purpose' cases.'" 129 S. Ct. at 1221 n.4 (quoting *Geier*, 529 U.S. at 869, 873-874 (emphasis deleted and citation omitted)).

regulate in a manner that was "uniform" and that minimized the burden on American business. See IRCA § 115, 100 Stat. at 3384.

Given these objectives, it is "incongruous" that "a Congress seeking uniformity * * * would intend to allow widely divergent state law." *Offshore Logistics, Inc.* v. *Tallentire*, 477 U.S. 207, 230 (1986); see also Laurence Tribe, *American Constitutional Law* § 6-31, at 1210 (3d ed. 2000) ("If the field is one that is traditionally deemed 'national,' the Court is more vigilant in striking down what would amount to state incursions into subjects that Congress may have validly reserved to itself.") (citing, *inter alia*, *Toll* v. *Moreno*, 458 U.S. 1, 10 (1982) ("recogniz[ing] the preeminent role of the Federal Government with respect to the regulation of aliens within our borders")); *cf. Ray* v. *Atlantic Richfield Co.*, 435 U.S. 151, 163 (1978) (plurality) (finding that "Congress intended [to establish] uniform national standards for design and construction" of tanker vessels, thus preempting more stringent state design requirements).

Given the express importance of uniformity in this sphere, it makes no difference whether the state's law is intended to supplant or merely to supplement the federal regulation. *Gade*, 505 U.S. at 104 n.2 (saving clause does not prevent implied preemption even where state law aims to supplement, rather than supplant, federal law) (citing *English* v. *General Elec. Co.*, 496 U.S. 72, 79-80 n.5 (1990)). As this Court has explained,

> where the federal government, in the exercise of its superior authority in this field, has enacted a complete scheme of regulation * * *

> states cannot, inconsistently with the purpose of Congress, conflict or interfere with, curtail *or complement*, the federal law, *or enforce additional or auxiliary regulations.*

Hines v. *Davidowitz*, 312 U.S. 52, 66-67 (1941) (emphasis added). Indeed, where the purpose of a federal statute is to "make a harmonious whole" and regulate in "a single integrated and all-embracing system," even a *complementary* state scheme would "stand[] as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Id.* at 67, 72, 74 (emphasis added).[10] That conclusion is particularly inescapable here, where the desire for uniformity is not merely *implied* from the scope of Congress's regulation but made *explicit* in the statute itself.

CONCLUSION

In light of the complex and intricate federal statutes, regulations, and agency procedures governing employment-related immigration law, and the daily practical realities for countless employers, employees, and practitioners who must comply with this carefully calibrated federal scheme, *Amici* urge this Court to reverse the decision of the Ninth Circuit and hold that the Legal Arizona Workers Act is preempted because it stands in conflict with the federal scheme and constitutes an obstacle to the

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10 Thus, the Arizona statute's provision forcing all employers to use the federal government's voluntary E-Verify system, Ariz. Rev. Stat. § 23-214, discussed in more detail by Petitioners and other amici, is still preempted, even if it "complement[s]" rather than "curtail[s]" the federal system. *Hines*, 312 U.S. at 66-67.

accomplishment and execution of the full purposes and objectives of Congress.

Respectfully submitted.

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SEPTEMBER 2010

APPENDIX

APPENDIX

Under the original INS rule implementing IRCA, 52 Fed. Reg. 16216, published on May 1, 1987, aliens who could work incident to status included:

> (1) An alien who is a lawful permanent resident (with or without conditions pursuant to section 216 of the Act), as evidenced by Form I-151 or Form I-551 issued by the Service;
>
> (2) An alien admitted to the United States as a lawful temporary resident pursuant to section 245A or 210 of the Act, as evidenced by an employment authorization document issued by the Service;
>
> (3) An alien admitted to the United States as a refugee pursuant to section 207 of the Act for the period of time in that status, as evidenced by an employment authorization document issued by the Service;
>
> (4) An alien paroled into the United States as a refugee for the period of time in that status, as evidenced by an employment authorization document issued by the Service;
>
> (5) An alien granted asylum under section 208 of the Act for the period of time in that status, as evidenced by an employment authorization document issued by the Service;

(6) An alien admitted to the United States as a nonimmigrant fiancé or fiancée pursuant to section 101(a)(15)(K) of the Act, or an alien admitted as the child of such alien, for the period of admission of the United States, as evidenced by an employment authorization document issued by the Service;

(7) An alien admitted as a parent (N-8) or dependent child (N-9) of an alien granted permanent residence under section 101(a)(27)(I) of the Act, as evidenced by an employment authorization document issued by the Service;

(8) An alien admitted to the United States as a citizen of the Federated States of Micronesia (CFA/FSM) or of the Marshall Islands (CFA/MIS) pursuant to agreements between the United States and the former trust territories, as evidenced by an employment authorization document issued by the Service;

(9) An alien granted suspension of deportation under section 244(a) of the Act for the period of time in that status, as evidenced by an employment authorization document issued by the Service;

(10) An alien granted withholding of deportation under section 243(h) of the Act for the period of time in that status,

as evidenced by an employment authorization document issued by the Service; or

(11) An alien who has been granted extended voluntary departure by the Attorney General as a member of a nationality group pursuant to a request by the Secretary of State. Employment is authorized for the period of time in that status as evidenced by Form I-9 issued by the Service.

Aliens who can work incident to status but only for a particular employer include:

(1) A foreign government official (A-1 or A-2), pursuant to 8 C.F.R. § 214.2(a). An alien in this status may be employed only by the foreign government entity;

(2) An employee of a foreign government official (A-3), pursuant to 8 C.F.R. § 214.2(a). An alien in this status may be employed only by the foreign government official;

(3) A foreign government official in transit (C-2 or C-3), pursuant to 8 C.F.R. § 214.2(c). An alien in this status may be employed only by the foreign government entity;

(4) A nonimmigrant crewman (D-1 or D-2) pursuant to § 214.2(d), and 8 C.F.R. Parts 252 and 253. An alien in this status may be employed only in a crewman capacity on the vessel or aircraft of arrival, or on a vessel or

aircraft of the same transportation company, and may not be employed in connection with domestic flights or movements of a vessel or aircraft;

(5) A nonimmigrant treaty trader (E-1) or treaty investor (E-2), pursuant to 8 C.F.R. § 214.2(e). An alien in this status may be employed only by the treaty-qualifying company through which the alien attained the status. Employment authorization does not extend to the dependents of the principal treaty trader or treaty investor (also designated "E-1" or "E-2"), other than those specified in paragraph (c)(2) of this section;

(6) A nonimmigrant student (F-l) pursuant to 8 C.F.R. § 214.2(f)(9). An alien in this status may be employed only in accordance with the following conditions:

(i) On campus for not more than twenty hours a week while school is in session; or

(ii) On campus full time when school is not in session if the student is eligible and intends to register for the next term or session. In addition, a nonimmigrant student (F-l) may engage in a work-study program as part of the regular curriculum available within the student's program of study in accordance with the conditions specified in 8 C.F.R. § 214.2(f)(l0);

(7) A representative of an international organization (G-1, G-2, G-3, or G-4), pursuant to 8 C.F.R. § 214.2(g). An alien in this status may be employed only by the foreign government entity or the international organization;

(8) A personal employee of an official or representative of an international organization (G-5), pursuant to 8 C.F.R. § 214.2(g). An alien in this status may be employed only by the official or representative of the international organization;

(9) A temporary worker or trainee (H-1, H-2A, H-2B, or H-3), pursuant to 8 C.F.R. § 214.2(h); An alien in this status could be employed only by the petitioner through whom the status was obtained;

(10) An information media representative (I), pursuant to 8 C.F.R. § 214.2(i). An alien in this status may be employed only for the sponsoring foreign news agency or bureau. Employment authorization does not extend to the dependents of an information media representative (also designated "I");

(11) An exchange visitor (J-1), pursuant to 8 C.F.R. § 214.2(j). An alien in this status may be employed only by the exchange visitor program sponsor or appropriate designee and within the guidelines of the program approved by the United States Information Agency;

(12) An intra-company transferee (L-1), pursuant to 8 C.F.R. § 214.2(1). An alien in this status may be employed only by the petitioner through whom the status was obtained;

(13) Officers and personnel of the armed services of nations of the North Atlantic Treaty Organization, and representtatives, officials, and staff employees of NATO (NATO-1, NATO-2, NATO-3, NATO-4, NATO-5 and NATO-6), pursuant to 8 C.F.R. § 214.2(o). An alien in this status may be employed only by NATO;

(14) An attendant, servant or personal employee (NATO-7) of an alien admitted as a NATO-1, NATO-2, NATO-3, NATO-4, NATO-5, or NATO-6, pursuant to 8 C.F.R. § 214.2(o). An alien admitted under this classification may be employed only by the NATO alien through whom the status was obtained; or

(15) A nonimmigrant alien within the class of aliens described in paragraphs (b)(9), (11), and (12) of this section whose status has expired but who has filed a timely application for an extension of such status pursuant to 8 C.F.R. § 214.2. These aliens are authorized to continue employment with the same employer for a period not to exceed 120 days beginning on the date of the expiration of the authorized period of stay. If the

alien's application for extension of stay has not been adjudicated within this period, the alien may apply to the district director for employment authorization pursuant to paragraph (c)(15) of this section.

Aliens who could work incident to status but only with an INS work authorization document included:

(1) An alien spouse or unmarried dependent son or daughter of a foreign government official (A-1 or A-2) pursuant to 8 C.F.R. § 214.2(a)(2), or the dependent of an employee of a foreign government official (A-3) pursuant to § 214.2(a)(3);

(2) An alien spouse or unmarried dependent son or daughter of an alien employee of the Coordination Council for North American Affairs (E-1) pursuant to 8 C.F.R. § 214.2(e);

(3) A nonimmigrant (F-1) student who:

(i) Is seeking off-campus employment authorization due to economic necessity pursuant to 8 C.F.R. § 214.2(1);

(ii) Is seeking employment for purposes of practical training pursuant to 8 C.F.R. § 214.2(1). The alien may be employed only in an occupation which is directly related to his or her course of studies; or

(iii) Has been offered employment under the sponsorship of an

international organization within the meaning of the International Organization Inununities Act (59 Stat. 669), if such international organization provides written certification to the district director having jurisdiction over the intended place of employment that the proposed employment is within the scope of the organization's sponsorship;

(4) An alien spouse or unmarried dependent son or daughter of an officer or employee of an international organization (G-4) pursuant to C.F.R. § 214.2(g);

(5) An alien spouse or minor child of an exchange visitor (J-2) pursuant to 8 C.F.R. § 214.2(j);

(6) A nonimmigrant (M-1) student seeking employment for practical training pursuant to 8 C.F.R. § 214.2(m) following completion of studies if such employment is directly related to the student's course of study;

(7) A dependent of an alien classified as NATO-I through NATO-7 pursuant to 8 C.F.R. § 214.2(n);

(8) Any alien who has filed a non-frivolous application for asylum pursuant to 8 C.F.R. Part 208. Employment authorization shall be granted in increments not exceeding one year during the period the application is

pending (including any period when an administrative appeal or judicial review is pending) and shall expire on a specified date;

(9) Any alien who has filed an application for adjustment of status to lawful permanent resident pursuant to 8 C.F.R. Part 245. Employment authorization shall be granted in increments not exceeding one year during the period the application is pending (including any period when an administrative appeal or judicial review is pending) and shall expire on a specified date;

(10) Any alien who has filed an application for suspension of deportation pursuant to 8 C.F.R. Part 244, if the alien establishes an economic need to work. Employment authorization shall be granted in increments not exceeding one year during the period the application is pending (including any period when an administrative appeal or judicial review is pending) and shall expire on a specified date;

(11) Any alien paroled into the United States temporarily for emergent reasons or reasons deemed strictly in the public interest pursuant to 8 C.F.R. § 212.5;

(12) Any deportable alien granted voluntary departure, either prior to or after hearing, for reasons set forth in 8 C.F.R. § 242.5(a)(2) (v), (vi), or (viii) may

be granted permission to be employed for that period of time prior to the date set for voluntary departure including any extension granted beyond such date. Factors which may be considered in adjudicating the employment application of an alien who has been granted voluntary departure are the following:

(i) The length of voluntary departure granted;

(ii) The existence of a dependent spouse and/or children in the United States who rely on the alien for support;

(iii) Whether there is a reasonable chance that legal status may ensue in the near future; and

(iv) Whether there is a reasonable basis for consideration of discretionary relief.

(13) Any alien against whom exclusion or deportation proceedings have been instituted, who does not have a final order of deportation or exclusion, and who is not detained may be granted temporary employment authorization if the district director detennines that employment is appropriate. Factors which may be considered by the district director in adjudicating the employment application of such an alien are the following:

(i) The existence of the economic necessity to be employed;

(ii) The existence of a dependent spouse and/or children in the United States who rely on the alien for support;

(iii) Whether there is a reasonable chance that legal status may ensue in the near future; and

(iv) Whether there is a reasonable basis for consideration of discretionary relief;

(14) An alien who has been granted deferred action, an act of administrative convenience to the government which gives some cases lower priority, if the alien establishes an economic necessity for employment; and

(15) A nonimmigrant alien within the class of aliens described in paragraphs (b)(9), (11), and (12) of this section whose application for extension of stay has not been adjudicated within the 120-day period as set forth in paragraph (b)(15) of this section.

AMICUS CURIAE BRIEF

Nos. 09-115

In The
Supreme Court of the United States

CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA *ET AL.*,
PETITIONERS,

v.

MICHAEL B. WHITING, *ET AL.*,
RESPONDENTS.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Brief of NumbersUSA Education & Research Foundation As *Amicus Curiae* Supporting Respondents and Affirmance

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October 28, 2010

Questions Presented

1. Whether federal law expressly preempts Arizona's law authorizing sanctions against licenses of employers that knowingly or intentionally employ unauthorized aliens when 8 U.S.C. § 1324a(h)(2) specifically preserves state sanctions "through licensing and similar laws."

2. Whether Arizona's law authorizing licensing sanctions against an employer is impliedly preempted by federal law even though the sanctions are within the savings clause in 8 U.S.C. § 1324a(h)(2) and Arizona's law is otherwise consistent with IRCA.

3. Whether Arizona's statute requiring employers within the State to use the federal E-Verify program to confirm that new employees are legally authorized to work in this country is impliedly preempted because Congress has not mandated the use of this federal program nationally.

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Ariz. Contractors Ass'n v. Napolitano, Nos. CV07-1355-PHX-NVW, CV07-1684-PHX-NVW, Dec. 21, 2007, 2007 WL 4570303 15,28

Ariz. Contractors Ass'n v. Candelaria, 534 F.Supp.2d 1036 (D.Ariz. 2008) 10

Chicanos Por La Causa Inc., v. Napolitano, 558 F.3d 856 (9th Cir. 2009 11,12,14

De Canas v. Bica, 424 U.S. 351 (1976) .....*passim*

Edwards v. Prime, Inc., 602 F.3d 1276 (11th Cir. 2010) 9

Fed. Deposit Ins. Corp. v. Meyer, 510 U.S. 471 (1994) 10

Fla. Lime & Avocado Growers, Inc. v. Paul, 373 U.S. 132 (1963) 6,14

Gray v. City of Valley Park Mo., _ F.Supp. 2d _, 2008 WL 294294 (E.D. Mo. 20 13

Hernandez v. Balakian, 480 F.Supp. 2d 1198 (E.D. Col 2007).....9

Hines v. Davidowitz, 312 U.S. 52 (1941) 14

Immigration and Naturalization Servs. v. Natl. Center for Immigrants, 502 U.S. 183 (1991).....26

Karmuth v. U.S., 279 U.S. 231 (1929) 26

Lamie v. United States Tr., 540 U.S. 526 (2004)....13

Lorillard Tobacco Co. v. Reilly, 533 U.S. 525 (2001) 8

Medtronic, Inc. v. Lohr, 518 U.S. 470 (1996).....6,8

Lozano v. City of Hazelton, __ F.3d __, 2010 WL 3504538 (3rd Cir. Sept. 9, 2010) 13

Plyler v. Doe, 457 U.S. 202 (1982) 7,13

Sprietsma v. Mercury Marine, 537 U.S. 51 (2002) 8,15

Sure-Tan, Inc. v. NLRB, 467 U.S. 883 (1984) 26

Toll v. Moreno, 458 U.S. 1 (1982) 6

U.S. v. Ye, 588 F.3d 411 (7th Cir. 2009) 9

Wyeth v. Levine, __ U.S. __, __, 129 S.Ct. 1187 (2009).....6

STATUTES

8 U.S.C. § 1324 .....*passim*

8 U.S.C. § 1324(a)(1)(B).....11

8 U.S.C. § 1324a .....*passim*

8 U.S.C. § 1324a(h)(2) 3,4,10

8 U.S.C. § 1324b.....9

The Immigration Control and Financial Responsibility Act of 1996, S. Rep 104-249 (1996).....8-9,11

The Immigration Reform and Control Act of 1986, Pub.L. No. 99-603, 100 Stat. 3359, (1986) 8

OTHER AUTHORITIES

H.R. Rep. 99-682(I) 12,18

S. Rep. 99-132 (1985) 17,25-26

130 CONG. REC. H5651-5658 (Jun. 12, 1984) 16,22

130 CONG. REC. S11448-50 (Sep. 13, 1985) 17,18

132 Cong. Rec. S33223 (1986).....18

Congressional Testimony by Vernon Briggs, April 4, 2008, www.cis.org/articles/2008/briggstestimony040408..30

Dept. of Homeland Security, *E-Verify*.....19

Executive Order 12781 (Nov. 20, 1981).....16

Federation for American Immigration Reform, *Lower Wages for American Workers*.....29

Federation for American Immigration Reform, *The Cost of illegal immigration to Arizonans*.....31

George Borjas, *Labor Market Consequences for illegal immigration in Arizona*, (Jan. 2008).....30

James Edwards, *E-Verify, Setting the Record Straight*.....29

Julie L. Hotchkiss & Myriam Quispe-Agnoli, *The Labor Market Experience and Impact of Undocumented Workers* (Jun. 2008).....29

NIFB Poll (Feb. 2010).....27

Peter Prengaman, *Business Owners Sue Firms Accused of Hiring Illegal Aliens*, Associated Press, Aug. 23, 2006.....31

U.S. Citizenship and Immigration Servs., *Westat Evaluation of the E-Verify Program: USCIS Synopsis of Key Findings and Program Implications*, (Jan. 28, 2010).....20

U.S. Citizenship and Immigration Servs., *DHS Unveils Initiatives to Enhance E-Verify*.....23

U.S. Citizenship and Immigration Servs., *Resolving and Tentative Nonconfirmation*.....23

U.S. Citizenship and Immigration Servs., *Reporting Violations*.....23

Westat, *Findings of the E-Verify Evaluation Program* (Dec. 2009).....*passim*

Zogby Poll, *Business Union Poll,* (Feb. 2010) www.cis.org/Business-Union-Poll.....3,27

STATEMENT OF INTEREST

Amicus curiae NumbersUSA is a non-partisan, non-profit, grassroots organization with more than one million members, including 30,000 members in Arizona, and members in every county in America, who seek immigration policies that protect against the displacement of U.S. workers and the depression of their wages, and the unfair competition against business owners who hire only legal workers.[1] NumbersUSA was created to advocate for the goals of the bi-partisan U.S. Commission on Immigration Reform, chaired by former Congresswoman Barbara Jordan, especially the creation of a mandatory workplace verification system.

Since 1996, NumbersUSA has researched and analyzed immigration policy issues, sharing its information with the media, with Congress, with its members and with the public. NumbersUSA's website, www.numbersusa.com, is the most viewed immigration website in the U.S. Nearly 25% of NumbersUSA's members are business owners, managers, or members of their families who support the Jordan Commission's high priority on a mandatory verification system to keep employers from hiring illegal foreign workers.

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[1] Pursuant to Rule 37.6, *amicus* certifies that no counsel for a party authored this brief in whole or in part, no such counsel or party made a monetary contribution intended to fund the preparation or submission of the brief, and no person other than the *amicus* or its counsel made such a monetary contribution.

PRELIMINARY STATEMENT

Congress's intent was and is to create a fair immigration policy that includes, in salient part, deterring illegal aliens by ending the lure of employment. While Congress has clearly preempted some parts of the enforcement of this immigration policy, it expressly and by implication left some to the states and individuals.

Although the Chamber of Commerce is concerned about the "burden" on business caused by this policy, it seems ironic that small businesses (which have never been reticent at explaining a burden of their own) have come out overwhelmingly in favor of enforcement of immigration law in the workplace.[2] Perhaps, they, unlike some of the other employers (who see the hiring of unauthorized employees as merely another cost to be passed on to the consumer) see the real burden in the competitive advantage that is held by those who do not bother to comply with the immigration law. It is this competitive advantage that keeps businesses which comply with the law from paying fair wages to their employees. It is this competitive disadvantage that burdens the thousands of businesses owned and operated by members of NumbersUSA. And this also burdens the low-income employees who cannot receive fair wages under this system.

To hog-tie the State of Arizona and its businesses and citizens and keep them from seeking relief from this unfair situation by prohibiting the

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[2] Zogby Poll, *Business-Union Poll* (Feb 2010), www.cis.org/Business-Union-Poll.

State of Arizona from requiring compliance with Congress's own statutes would, in fact, go against the intent of Congress to protect these legal workers and these law-abiding businesses.

SUMMARY OF ARGUMENT

This case involves a savings clause in an express preemption provision. The actions of the State of Arizona seeking to enforce federal law prohibiting hiring authorized aliens has put it and its citizens in the crossfire of immigration policy.

Congress crafted "employer sanctions," a new package of prohibitions, enforcement mechanisms and penalties, also designed to prohibit the employment of unauthorized aliens. 8 U.S.C. § 1324a. The penalties under § 1324a for hiring unauthorized aliens are much less severe than those available under § 1324.

Section 1324a, however, includes an express preemption clause, with a "savings clause" for "licensing and similar laws": "[t]he provisions of this section preempt any State or local law imposing civil or criminal sanctions (other than through licensing and similar laws) upon those who employ, or recruit or refer for a fee for employment, unauthorized aliens." 8 U.S.C. § 1324a(h)(2).

The State of Arizona enacted laws to enhance the effectiveness of the federal laws by providing both for the mandatory use of E-Verify for new hires and real sanctions for employment of unauthorized aliens.

Petitioners argue that the Arizona laws are preempted explicitly as being beyond the parameters

of the savings clause and implicitly as being in conflict with the intent of Congress to avoid burdens to business and affect a balance between the interests of immigration enforcement and business needs.

However, the Petitioners reading of the savings clause is so narrow as to make it nearly non-existent. Further, Congress's intent in making the use of E-Verify voluntarily was not out of a concern for the burden it would cause businesses, but the costs it would cause the federal government without knowing its validity as a mechanism. The facts make clear that E-Verify, in fact, relieves the considerable burden of I-9 compliance and failure at compliance. Nor do Arizona's laws conflict with Congressional intent even if it were to avoid a burden on businesses. The real burdens on businesses is to comply with federal immigration laws without such a system causing both unfair advantaged for non-complying businesses and disruption of the workplace when the I-9 systems fails. The other burden is on the workers of the state who potentially face discrimination and lower wages.

ARGUMENT

Since "the purpose of Congress is the ultimate touchstone" for preemption, *Altria Group v. Good*, _ U.S. __, __, 129 S.Ct. 538, 543 (2008), the burden of proving preemption is on Petitioners.

State laws which prohibit the hiring of unauthorized aliens are subject to different standards of review than those which regulate the

admission of aliens to the country. *De Canas v. Bica*, 424 U.S. 351, 358 n. 6 (1976).

Congress does not "cavalierly" preempt states or municipalities from acting within the parameters of their historic police powers. *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 485 (1996).

The burden to preempt a State law targeting unauthorized aliens is very high; it is not enough just to have "strong evidence" of "congressional intent to preempt." *Toll v. Moreno*, 458 U.S. 1, 13 n. 18 (1982). "Only a demonstration that complete ouster of state power including state power to promulgate laws not in conflict with federal laws was "the clear and manifest purpose of Congress" would justify that conclusion. *Florida Lime & Avocado Growers v. Paul*, [373 U.S. 132] at 146 [1963]." *De Canas*, 424 U.S. at 357; *Wyeth v. Levine*, __ U.S. __, __, 129 S.Ct. 187, 1194-95 (2009) ("historic police powers of the States[3] were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress").

> With respect to the actions of the Federal Government, alienage classifications may be intimately related to the conduct of foreign policy, to the federal prerogative to control access to the United States, and to the plenary federal power to determine who has sufficiently manifested his allegiance to become a citizen of the Nation. No State may independently exercise a like power. But if the Federal Government has by uniform rule

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[3] Prior to 1986, the states had historically enacted laws to prohibit the employment of unauthorized aliens, while the federal government had not. *De Canas*, 424 U.S. at 360-61.

> prescribed what it believes to be appropriate standards for the treatment of an alien subclass, the States may, of course, follow the federal direction.

Plyler v. Doe, 457 U.S. 202, 219 n. 19 (1982).

State laws affecting unauthorized aliens, however, must "mirror federal objectives and further[] a legitimate state goal." *Plyler*, 457 U.S. at 225. "Legitimate state goals" of State laws against illegal immigration include protecting jobs, wages and working conditions, a State's "fiscal interests," and the effectiveness of labor unions. *De Canas*, 424 U.S. at 356-57. Nevertheless, within those limitations, States may impose any non-conflicting burden on unauthorized aliens that Congress did not "unmistakably" intend to oust, and State laws need not be exactly the same as federal law. *De Canas*, 424 U.S. at 356.

In other words, Petitioners must show either that Congress expressly preempted state action with the federal law or that the state law conflicts with the very intent of Congress in enacting the law prohibiting the employment of unauthorized aliens.

The Petitioners have not met their burden, and the Court of Appeals for the Ninth Circuit properly rejected their arguments on all three Questions facing this Court. The decision below should be affirmed.

I) ARIZONA'S LAW IS NOT EXPRESSLY PREEMPTED BECAUSE IT IS A "LICENSING OR SIMILAR LAW" WHICH HARMONIZES WITH CONGRESSIONAL INTENT.

Express pre-emption occurs when Congress expressly declares a law's pre-emptive effect. *See Lorillard Tobacco Co. v. Reilly,* 533 U.S. 525, 541 (2001). In such cases, "our task is to identify the domain expressly pre-empted." *Id.* In doing so, the courts focus in the first instance "on the plain wording of the [federal statute's pre-emption] clause, which necessarily contains the best evidence of Congress' pre-emptive intent." *Sprietsma v. Mercury Marine,* 537 U.S. 51, 62-63 (2002) (internal quotation marks omitted). The courts also consider the "structure and purpose of the statute as a whole ... as revealed not only in the text, but through [our] reasoned understanding of the way in which Congress intended the statute and its surrounding regulatory scheme to [operate]." *Medtronic,* 518 U.S. at 486 (internal quotation marks and citation omitted).

Until 1986, federal law did not prohibit the hiring of unauthorized aliens. *De Canas,* 424 U.S. at 360-61 (discussing the "Texas Proviso" which said that hiring unauthorized aliens was not "harboring" under 8 U.S.C. § 1324). In the Immigration Reform and Control Act of 1986, ("IRCA"), Pub.L. No. 99-603 (1986), Congress made two changes in federal law to prohibit the hiring:

First, Congress deleted the "Texas Proviso" in 8 U.S.C. § 1324, thus criminalizing employment of unauthorized aliens as "harboring." Penalties under § 1324, as increased in 1996, include private treble damages and attorneys' fees, state-level liability exposure, seizure of property, and even the death penalty for causing the death of any person,

including an unauthorized alien, while harboring. 8 U.S.C. § 1324(a), (b).

There is no preemption clause under § 1324. Nor is there any indication that Congress intended to preempt private or state-level enforcement of this prohibition on hiring unauthorized aliens: in 1996, Congress expressly sought private and state-level enforcement of harboring penalties against employers of unauthorized aliens. "Immigration Control and Financial Responsibility Act of 1996," S. Rep. 104-249 (1996), at 12.

Petitioners do not discuss the change to § 1324, but it is a significant enforcement mechanism used today against employers of unauthorized aliens. *See, e.g., Edwards v. Prime, Inc.*, 602 F.3d 1276, 1299 (11th Cir. 2010) ("We tend to agree with the Second Circuit that the revision history of § 1324(a)(1)(A)(iii) strongly indicates that one who hires an alien knowing or recklessly disregarding his illegal status is guilty of concealing, harboring, or shielding from detection."); *U.S. v. Ye*, 588 F.3d 411 (7th Cir. 2009) (same); *Hernandez v. Balakian*, 480 F.Supp.2d 1198 (E.D.Cal. 2007) (private suit against employer of unauthorized aliens).

The expansions of § 1324 in 1986 and 1996 tend to undercut Petitioners' argument that Congress intended to oust state power to prohibit the hiring of unauthorized aliens; rather they indicate that Congress was expanding the available mechanisms to effect its intent to stop the employment of unauthorized aliens.

Second, Congress crafted "employer sanctions," a new package of prohibitions,

enforcement mechanisms and penalties, also designed to prohibit the employment of unauthorized aliens. 8 U.S.C. § 1324a. The penalties under § 1324a for hiring unauthorized aliens are much less severe than those available under § 1324.

Section 1324a, however, includes an express preemption clause, with a "savings clause" for "licensing and similar laws": "[t]he provisions of this section preempt any State or local law imposing civil or criminal sanctions (other than through licensing and similar laws) upon those who employ, or recruit or refer for a fee for employment, unauthorized aliens." 8 U.S.C. § 1324a(h)(2).

Petitioners contend that Arizona's law is expressly preempted under this provision because it provides civil and criminal sanctions on employers of unauthorized aliens. Petitioners' Br., at 16. Petitioners deny that Arizona's law is within the savings clause of "licensing and similar laws" because "Nothing about the Arizona Act remotely resembles a 'licensing law.'" *Id.*

Congress did not define the terms "licensing and similar laws" in the savings clause. Terms that are not statutorily defined are usually ascribed their "ordinary or natural meaning." *Fed. Deposit Ins. Corp. v. Meyer,* 510 U.S. 471, 476 (1994). Arizona's law denies business and similar licenses to those who employ unauthorized aliens. Ariz. Rev. Stat. § 23-212(F)(1).

How can a mandate for the denial of a business or similar license not be a licensing law?

The District Court held that Arizona's law was within the savings clause. *Ariz. Contractors Ass'n v. Candelaria,* 534 F.Supp. 2d 1036, 1046-47

(D.Ariz. 2008). The Ninth Circuit agreed. *Chicanos Por La Causa, Inc. v. Napolitano*, 558 F.3d 856, 864-66 (9th Cir. 2009). Both lower courts noted that the plain language of the savings clause seems to cover Arizona's law.

Petitioners argue expansively that this interpretation is too broad: "If this is all that is required to satisfy the savings clause, the preemption provision is a nullity." Petitioners' Br., at 22. Indeed, Petitioners claim that if Arizona's licensing law is not preempted, the "fundamental purpose" of the prohibition on hiring unauthorized aliens "is utterly without effect." Petitioners' Br., at 17.

Petitioners' argument is that the loss of a business license is a "death penalty" for a business employing unauthorized aliens, and Congress could not have contemplated such a drastic sanction for employing unauthorized aliens. Petitioners' Br., at 35. This is an odd contention, given that Congress has enacted an actual death penalty provision under § 1324 for some individuals who hire unauthorized aliens for gain. 8 U.S.C. § 1324(a)(1)(B); "Immigration Control and Financial Responsibility Act of 1996," S. Rep. 104-249 (1996), at 27 (rejecting Simon amendment to delete death penalty provisions).

Essentially here, then, the petitioners argue that is not a licensing law *merely* because there is a potential for an extreme result. The converse then is that if Arizona had chosen a less drastic result—say suspending the business license for a month, there would be no problem. Yet, there is no indication in the text or legislative history of IRCA that Congress

intended the savings clause in § 1324a to permit only state "licensing and similar laws" that cover nothing but minor offenses or impose minor penalties. And there is no logic to such an argument.

Quoting one sentence in a House Judiciary Committee report, H.R. Rep. 99-682(I), at 58 (1986), Petitioners contend that the savings clause was intended only to permit state "licensing and similar laws" which "tack on" additional penalties for those who have already been found to have violated 8 U.S.C. § 1324a's prohibition on hiring. Petitioners' Br., at 17-18. The Ninth Circuit noted that Petitioners' position doesn't take into account the rest of the paragraph Petitioners rely on. *Chicanos Por La Causa, Inc.*, 558 F.3d at 865-66.

Yet the relevant portions of that House report were even broader than the courts below cited. The paragraphs immediately before and after the sentence Petitioners quoted also permit other types of state "licensing and similar laws," such as those that do not impose "civil fines and/or criminal sanctions," and state labor protection laws. H.R. Rep. 99-682(I) at 58.

These additional portions of the House report add vital context to the statutory text of the savings clause. They explain, for example, how the savings clause might interact with the private enforcement provisions of § 1324. They also explain that the savings clause was intended to permit states vigorous enforcement of labor law protections, a traditional area of state regulation recognized by this Court in *De Canas*. 424 U.S. at 356-57.

Overall, especially looking in context at § 1324 as well as § 1324a, Congress does not seem to have intended a narrow or limited construction for the savings clause. A broad sweep, contrary to Petitioners' argument, would seem more in keeping with Congress's intention in 1986 and 1996 to create expansive measures to stop the hiring of unauthorized aliens.

Petitioners' legitimate concern that the savings clause not swallow the preemption provision is addressed by the usual preemption review requirement that state laws affecting unauthorized aliens must "mirror federal objectives and further[] a legitimate state goal." *Plyler*, 457 U.S. at 225; *De Canas*, 424 U.S. at 356-57. The word "and" is critical in applying this standard. The state need not be an exact mirror of the federal law. The state law must mirror the federal objectives (stopping employment of unauthorized aliens) AND should further a legitimate state goal (protecting the economy of the state).

When statutory language is plain and unambiguous, "the sole function of the courts ... is to enforce it according to its terms." *Lamie v. United States Tr.*, 540 U.S. 526, 534 (2004) (internal quotation marks omitted). That is what the courts below, and other courts[4] which have looked at the language and history of the savings clause, have done. The Arizona law is within the savings clause, and is thus not expressly preempted.

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[4] *See, e.g., Lozano v. City of Hazelton*, __ F.3d __, ___, 2010 WL 3504538, (3rd Cir. Sept. 9, 2010, at *30-32 (express preemptive analysis); *Gray v. City of Valley Park, Mo.*, __ F.Supp.2d __, 2008 WL 294294 (E.D. Mo. 2008), at *10-12 (same).

II) CONGRESS DID NOT INTEND TO PREVENT STATES FROM USING THE FEDERAL E-VERIFY SYSTEM TO HELP STOP THE HIRING OF UNAUTHORIZED ALIENS.

Petitioners, in a few paragraphs at the end of their brief, address the third Question. Petitioners contend that Arizona's law requiring use of the federal E-Verify employment authorization system is "impliedly preempted."

The courts below rejected this argument, noting that Congress could, but did not, provide for an express preemption of state laws requiring participation in E-Verify. *Chicanos Por La Causa, Inc.*, 558 F.3d at 866-67. The Ninth Circuit noted that the existence of the savings clause demonstrates that Congress did not intend to foreclose participation in E-Verify, and the legislative history indicates that Congress was instead intending to encourage use of the system. *Id.* at 867.

The Petition (although not explained in terms of governing precedent) apparently intended this as a conflict preemption claim. Petitioners' Br., at 51 ("conflicts with the language, structure, and intent of federal immigration law").

Conflict preemption occurs when either "compliance with both federal and state regulations is a physical impossibility," *Fla. Lime & Avocado Growers, Inc. v. Paul,* 373 U.S. 132, 142-43 (1963), or where "state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress," *Hines v. Davidowitz,*

312 U.S. 52, 67 (1941)). "[O]ur task of statutory construction must in the first instance focus on the plain wording of the clause, which necessarily contains the best evidence of Congress' preemptive intent." *Sprietsma v. Mercury Marine,* 537 U.S. 51, 62-63 (2002). To meet the conflict preemption requirements the state law must mirror the federal objectives (stopping employment of unauthorized aliens) AND should further a legitimate state goal (protecting the economy of the state) BUT may not obstruct the original Congressional intent.

With what Congressional intent do the Arizona laws interfere?

Here Petitioners suggest that Congress intended to "avoid imposing serious burdens on employers." Petitioners' Br., at 48.

Other than "erroneous tentative nonconfirmations" of authorizations to work for certain foreign-born persons, Petitioners do not offer any specific reasons why they feel a mandatory E-Verify program would be burdensome to employers. No specific reason was offered at trial.

This assertion of conflict, then, is about employer burden.

In denying a preliminary injunction early in the case, the District Court expressly rejected Petitioner's "employer burden" argument. *Ariz. Contractors Ass'n v. Napolitano,* Nos. CV07-1355-PHX-NVW, CV07-1684-PHX-NVW, Dec. 21, 2007, 2007 WL 4570303, at *6-7.

Petitioners' theory that Congressional intent was to avoid a burden on business is also inconsistent with the history of E-Verify and the reality of E-Verify.

Contrary to Petitioners' theory, the mandatory system was not intended to "burden" employers. It was intended to help them.

Petitioners begin their history of E-Verify with the 1996 legislation, rather than looking at the entire history of federal consideration of electronic employment authorization verification systems. The full legislative history of E-Verify, in fact, shows exactly the opposite of Petitioners' theory: Congress felt that a mandatory electronic verification system would both be less burdensome to employers and less likely to give rise to discriminatory conduct.

E-Verify, in its earliest form, was promoted as a telephone-based verification system for Social Security numbers, similar to that used by merchants to verify credit card transactions. *See, e.g.*, Exec. Order 12781 (Nov. 20, 1981) (authorizing INS to conduct alternative employment verification programs).

During the 1984 debate over H.R. 1510, an earlier version of IRCA, the House of Representatives adopted Cong. Sam Hall's amendment to require a mandatory telephone employment authorization verification system. 130 CONG. REC. H 5651-5658 (June 12, 1984). Cong. Hall's system was based on credit card verification systems of the time. *Id.*, at H5651, H5654.

Cong. Hall was an avowed opponent of "employer sanctions." 130 CONG. REC. H5651 (Statement of Cong. Sam Hall). He believed a mandatory system of employment authorization verification would help, not burden, employers: "A call-in system such as I propose in this amendment, however, relieves employers of a verification role."

Id. Other opponents agreed: "it is my understanding that the sole purpose of this amendment is to protect the employer." *Id.*, at H5656 (Statement of Cong. Roybal).

In addition, the mandatory telephone verification system was viewed by opponents of employer sanctions as an important anti-discrimination measure. "I think what the gentleman from Texas [Cong. Hall] is offering is a way to verify the legal right to work without discrimination, and it removes the onus from the employer." *Id.*, at H5655-56 (Statement of Cong. Martinez). Proponents of the bill agreed. *Id.*, at H5657-58 (Statement of Cong. John McCain) ("such a system would remove any possible incentive an employer had to discriminate against potential employees.").

The Senate, however, which had been more skeptical of the need for anti-discrimination measures,[5] rejected the Hall mandatory verification amendment. Instead the Senate adopted Sen. Lawton Chiles' amendment providing for a study of a computerized verification system. 130 CONG. REC. S11448 (Sept. 13, 1985) (Amdt. 609) (statements of Sens. Simpson and Simon). Then the Senate adopted Sen. Patrick Moynihan's amendment of a similar study of a computer-readable and employer-verifiable Social Security card. *Id.*, at S. 11450 (Amdt 610).

The statements of IRCA's chief architect, Senator Simpson, confirm that equal application to all employers was the most important anti-

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[5] "The Committee does not believe that such discrimination will occur." S. Rep. 99-132, at 9.

discrimination provision. Responding to concerns that repeat violators will never "hire anybody again who looks foreign," Simpson stated:

> We are asking here for the citizens of America and noncitizens and those who are authorized to work to present a document...[The document requirement] says you are legal to work and that document is not intrusive...It is presented at the time of new hire employment and it is presented by people who "look foreign" and by bald Anglo skinny guys like me, too. Anything else and you would truly have discrimination. That is the issue. I have been through that one plenty of times, and it is extraordinary to me to think that the issue of employers being the policemen of the country, that one went out the window a long time ago. If we do not ask employers of America to handle our withholding tax, who would?...We have penalties against those employers who choose not to do that. That is what we are talking about.

132 Cong. Rec. 33223 (1986); *see also* H.R. Rep. No. 99-682(I), at 45-46.

Nothing in the debates on this change indicated any concern that a mandatory system would impose "serious burdens on employers." Petitioners' Br., at 48. The major reason for dropping the mandatory verification requirement passed by the House and instead requiring only a study was the projected cost. "To implement such a system without knowing whether it would work would be expensive. A study would clarify that." *Id.*, at S 11448 (Statement of Sen. Simpson).

The legislative history, coupled with the express preemption analysis in the courts below, suggests that Congress was not concerned about mandatory E-Verify "imposing serious burdens on employers." Petitioners' Br., at 48. There is no evidence that requiring use of E-Verify would obstruct congressional intent to stop the hiring of unauthorized aliens. There is no "clear and manifest" evidence that Congress intended to preempt any state-level attempts to require the use of E-Verify.

Even if there were such a Congressional intent, the facts show that E-Verify is anything but a burden. Rather it potentially replaces the more burdensome mandatory paper I-9 system. The E-Verify system is an effective and uniform means of combating unauthorized hires, thus furthering the intent of Congress. More than 216,000 employers are enrolled in the free E-Verify program, with over 8.7 million queries run through the system in fiscal year 2009.[6] There have been over 13 million queries run through the system in fiscal year 2010 (as of July 31, 2010). *Id.* The expansive database of over 455 million records in the Social Security Administration database provided by the government allows employers greater ability to ensure that their hires are authorized to work in the United States. *Id.*

An evaluation of the E-Verify system during 2008 found that 96% of all E-Verify cases received a

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[6] Dept. of Homeland Security, *E-Verify*, http://www.dhs.gov/files/programs/gc_1185221678150.shtm (last visited Oct. 26, 2010).

correct initial finding.[7] Of all E-Verify queries in 2008, only 3.3% returned a false positive for an unauthorized worker, mainly due to the difficulties in detecting unauthorized aliens who used identity theft in order to obtain a job.[8]

While issues remain in the effectiveness of E-Verify to detect all unauthorized aliens who use identity theft or documents of authorized workers in order to get a job, the traditional paper I-9 system alone is far less reliable in detecting these attempts. Without E-Verify, the likelihood of employers detecting fraudulent documents varies on a wide variety of factors including the quality of the documents, the employers' familiarity with immigration and other documents, and their expertise in detecting fraudulent documents. *Findings of the E-Verify Evaluation Program*, note 8, at 131. The E-Verify system adds an extra step and cross references these documents with information in the SSA database to determine the veracity. *Id.* As a result, the E-Verify system detects nearly all unauthorized aliens who attempt to use counterfeit documents or make false claims in their job applications.[9]

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[7] Westat, *Findings of the E-Verify Evaluation Program*, at xxx (Dec. 2009) http://www.uscis.gov/USCIS/E-Verify/E-Verify/Final%20E-Verify%20Report%2012-16-09_2.pdf

[8] United States Citizenship and Immigration Servs., *Westat Evaluation of the E-Verify Program: USCIS Synopsis of Key Findings and Program Implications* 6 (Jan. 28, 2010) http://www.uscis.gov/USCIS/Native%20Docs/Westat%20Evaluation%20of%20the%20E-Verify%20Program.pdf

[9] James Edwards, *E-Verify, Setting the Record Straight*, http://www.numbersusa.com

In order to address the identity theft issue, the government is working to improve the E-Verify system so that it can be more effective in catching unauthorized workers who try to gain employment through identity theft. The E-Verify program includes a Photo Tool that allows employers to view photographs in the database of workers presenting USCIS-issued permanent residence ("green") cards and employment authorization documents. Thus, the employer can view the photo that is on file with these documents and compare them to the documents offered by the applicant. *Westat Evaluation of the E-Verify Program: USCIS Synopsis of Key Findings and Program Implications*, note 9, at 7 ("Westat Findings"). By matching photograph in the E-Verify program with the identification the worker presents, the employer can confirm that the document has not been altered. This feature has vetted over 300,000 photos with employers and detected more than 1,000 instances of fraudulent immigration documents. *Id.* This year, USCIS is adding visa photographs to the database and is working with states to include driver's license photographs as well. *Id.* at 8. As the system continues to improve, it will be harder for unauthorized workers to cheat the system.

The level of burden to those businesses using the more accurate E-Verify pales in comparison to the burden to businesses using I-9 with its low level

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/content/learn/enforcement/workplace-verification/e-verify-setting-record-straight.html (last visited Oct. 26, 2010) (noting that of the 6.2% of cases involving unauthorized workers, approximately half were falsely given work authorization due to the use of documents in identity theft).

of accuracy. One of the greatest "burdens" on businesses occurs when unauthorized workers have been found in their workplaces. Even if the businesses avoid the penalties for hiring unauthorized workers, the cost to the business due to the disruption of the workplace and the retraining of new hires is far greater. In the face of these costs the temptation to avoid employing all persons who appear to be immigrants is great.

Which brings us to a real burden: the burden to workers who are discriminated against because employers know the I-9 paper documentation is not a reliable system.

It is clear that the E-Verify system helps prevent employer discrimination of potential hires. E-Verify allows employers to simply enter information that is provided by the potential hire's I-9 forms into the E-Verification, where it is cross-referenced against the government's vast database to verify the legality of the hire. *E-Verify*, note 7. The online system removes any biases or prejudicial notions a reviewing employer may hold against a potential hire by taking the verification process out of their hands. The database does not care about ethnicity, appearance or accent of a potential hire, it merely evaluates whether the individuals paperwork is in order. That takes the discretion, and thus the opportunity for discrimination, out of the process. This is exactly what Congress intended in 1983, when it considered the effect of an electronic verification system. 130 Cong. Rec. H5651 (Statement of Cong. Hall).

In addition, DHS will report to the DOJ instances where there is evidence an employer used

E-verify for discriminatory purposes.[10] Furthermore, 17% of businesses stated that they were more likely to hire foreign born workers after implementing E-Verify, as opposed to only 2% of businesses who had a decreased willingness to hire foreign born workers after implementing the system. *Westat Findings*, Note 8, at 206.

E-Verify also provides for the rights of the applicant to challenge the findings of the E-Verify system.[11] If an applicant's paperwork is not consistent, the USCIS will ask the employer to verify the information to rule out human error. If human error is ruled out, then a tentative nonconfirmation finding (TNC) will be issued. *Id.* Employers must allow workers time to contact Social Security or DHS to cure any problems with the workers' records. *Id.* Employers who act against a worker earlier can be fined by the Department of Justice for a civil rights violation.[12]

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[10] U.S. Citizenship and Immigration Servs., *DHS Unveils Initiatives to Enhance E-Verify*, http://www.uscis.gov/portal/site/uscis/menuitem.5af9bb95919f35e66f614176543f6d1a/?vgnextoid=70beadd907c67210VgnVCM100000082ca60aRCRD&vgnextchannel=68439c7755cb9010VgnVCM10000045f3d6a1RCRD (last visited Oct. 26, 2010).

[11] U.S. Citizenship and Immigration Servs., *Resolving a Tenative Nonconfirmation*, http://www.uscis.gov/portal/site/uscis/menuitem.eb1d4c2a3e5b9ac89243c6a7543f6d1a/?vgnextoid=017bfb41c8596210VgnVCM100000b92ca60aRCRD&vgnextchannel=017bfb41c8596210VgnVCM100000b92ca60aRCRD (last visited Oct. 26, 2010).

[12] U.S. Citizenship and Immigration Servs., *Reporting Violations*, http://www.uscis.gov/portal/site/uscis/menuitem.eb1d4c2a3e5b9ac89243c6a7543f6d1a/?vgnextoid=c35bfb41c8596210VgnVCM100000b92ca60aRCR

The more E-Verify is used, the more effective the system will become. "As it becomes harder to obtain fraudulent documents that will not be detected by E-Verify, the cost of such documents will presumably increase. Therefore, an important deterrent value of the Program ultimately may be to increase the cost of obtaining unauthorized employment, which, in turn, would cause some reduction in unauthorized employment." *Westat Findings*, Note 8, at 141. The study also noted that there is evidence for unauthorized aliens to avoid employers who use E-Verify out of a fear of being identified as an unauthorized worker. *Id.* Therefore the more businesses that use E-Verify, the more of a deterrent it will become to prevent unauthorized hires. Arizona's decision to require businesses to use E-Verify will fulfill the intent of Congress to reduce unauthorized labor.

It appears that Petitioners have misjudged what was Congressional intent in making E-Verify voluntary. Employers can comply with E-Verify, and Congress seemed to want them to do so. The Arizona law is not preempted.

III. ARIZONA'S LAW IS NOT IMPLIEDLY PREEMPTED BECAUSE IT IS CONSISTENT WITH CONGRESSIONAL INTENT TO STOP THE HIRING OF UNAUTHORIZED ALIENS.

Nor is Arizona's law preempted because it "undermines the comprehensive scheme that

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D&vgnextchannel=c35bfb41c8596210VgnVCM100000b92ca60aRCRD (last visited Oct. 26, 2010).

Congress created to regulate the employment of aliens." This is the major point of Petitioners' case: that Arizona is not permitted to enact its own "licensing and similar laws" because Congress intended to preempt all such laws despite the plain language of the savings clause.

Petitioners rely on a "balancing" argument, saying: "Arizona's statute pursues a single goal—the prevention of unlawful immigration—to the exclusion of all others. It has adopted an enforcement-at-all costs strategy, with the solitary goal of 'stop[ping] illegal immigration.'" Petitioners' Br., at 45. Petitioners argue that Arizona ignored anti-discrimination provisions and burdens on employers, and therefore disrupted a complex and exclusive federal system.

As with their arguments against mandatory employment authorization, in making this "balance" argument, Petitioners seem to have focused entirely on a few sentences in some Committee reports, and ignored the text, structure and legislative history of IRCA and the prohibitions on hiring unauthorized aliens. For example, the most severe penalties for hiring unauthorized aliens are imposed under § 1324, not § 1324a, yet Petitioners never even mention § 1324. Section § 1324 contains no "balance" such as proposed by Petitioners, which may explain the omission.

More importantly, Petitioners are simply missing the entire point of IRCA and the subsequent congressional amendments to enforcement of the prohibition against hiring unauthorized aliens. Congress did not seek an overall "balance" of a variety of goals; it included many mechanisms in §

1324a, but overall, as shown by the expansion of § 1324, it simply wanted to stop illegal immigration. "The major purpose of this bill is to make progress toward the day when the American people can be assured that the limitations and selection criteria contained in the immigration statutes are **actually implemented through adequate enforcement.**" S. Rep. 99-132, at 3 (emphasis added). This court recognized that overall purpose when it considered and rejected this "balancing" analysis of IRCA. *INS v. National Center for Immigrants' Rights,* 502 U.S. 183,194, n. 8 (1991).

Seen in this light, Arizona's "enforcement-at-all costs strategy, with the solitary goal of 'stop[ping] illegal immigration'," Petitioners' Br., at 45, seems consistent with congressional intent. Conversely, since Petitioners' "burden on employers" theory does not apply to § 1324, especially after 1996, when the possibility for the death penalty was added, Petitioners' theory seems less consistent with congressional intent.

In addition, Petitioners' "balance" theory seems illogical in light of Congress's historic interests in immigration law. Since at least 1986 (and in most cases before then), Congress has always intended to protect American workers. A primary purpose of the immigration statutes is to "preserve jobs for American workers." *INS v. National Center for Immigrants' Rights,* 502 U.S. at 194; *Sure-Tan, Inc. v. NLRB,* 467 U.S. 883, 893 (1984). One of the "great purposes was to protect American labor against the influx of foreign labor." *Karnuth v. United States,* 279 U.S. 231, 244 (1929).

Amicus will not repeat the Respondents' arguments. It points out however, that small businesses apparently do not hold the same view of the burden of information of these provisions. A study made by the Research Foundation of the National Federation of Independent Businesses (NFIB)[13] shows that 80% of small business owners favor prosecution of employers who knowingly make unauthorized hires.[14] Furthermore, 67% of small business owners support enforcement at the workplace of immigration laws. Id.

Petitioners treat illegal immigration as just another cost of doing business, or perhaps as simply an economic transaction. For millions of Americans, illegal immigration is much more.

In fact, in denying a preliminary injunction early in the case, the District Court discussed the real burden caused by these injustices:

> Those who suffer the most from unauthorized alien labor are those whom federal and Arizona law most explicitly protect. They are the competing lawful workers, many unskilled, low-wage, sometimes near or under the margin of poverty, who strain in individual competition and in a wage economy depressed by the great

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[13] NFIB is a leading small business association representing small and independent businesses. A nonprofit, nonpartisan organization founded in 1943, NFIB represents the consensus views of its members in Washington and all 50 state capitals. NFIB's mission is to promote and protect the right of their members to own, operate and grow their businesses.

[14] NFIB Poll (Feb. 2010) and Zorby Poll (Feb. 2010) http://www.cis.org/Business-Union-Poll

> and expanding number of people who will work for less. (Facts Ex. 221 at 1.).
>
> If the Act is suspended, whether for a month or for years, the human cost for the least among us, measured by each person's continued deprivation, multiplied by their number, will be a great quantum. Even if the injunction is lifted later, their loss will never be paid back.
>
> Against all this, Plaintiffs suffer only the expense of having their computer staff log some more hours, with off-setting business benefits as well, and helping authorized workers clear up their records. This is not a sharp tipping of the balance of hardships in favor of Plaintiffs. The balance does not even tip in their direction.

Ariz. Contractors Ass'n v. Napolitano, Nos. CV07-1355-PHX-NVW, CV07-1684-PHX-NVW, Dec. 21, 2007, 2007 WL 4570303, at *6-7.

This Court has also recognized those impacts:

> Employment of illegal aliens in times of high unemployment deprives citizens and legally admitted aliens of jobs; acceptance by illegal aliens of jobs on substandard terms as to wages and working conditions can seriously depress wage scales and working conditions of citizens and legally admitted aliens; and employment of illegal aliens under such conditions can diminish the effectiveness of labor unions. These local problems are particularly acute in California in light of the significant influx into that State of illegal aliens from neighboring Mexico. In attempting

> to protect California's fiscal interests and lawfully resident labor force from the deleterious effects on its economy resulting from the employment of illegal aliens, § 2805(a) focuses directly upon these essentially local problems and is tailored to combat effectively the perceived evils.

De Canas, 424 U.S. at 356-57.

Those "local problems" have not gone away. In fact, they have worsened. The wage depressing effect of illegal immigrant workers was documented in 2008 by researchers working for the Federal Reserve Bank of Atlanta, who concluded that average wages among legal workers are lower in industries that employ illegal workers and that a greater share of undocumented workers in those industries further lowers wages.[15] Out of America's 25 largest metropolitan areas, immigrant wages are at least 10 percent lower than native wages in 24 cities for cashiers and clerks, 23 for construction traders, 22 for cleaning and other building services, and all 25 for fabricators.[16] This discrepancy is likely due to unauthorized worker hires. In general, as more unauthorized aliens find jobs in the country, the expansion of the labor market pool drives down wages as there are more workers than there are jobs to fill.

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[15] Julie L. Hotchkiss & Myriam Quispe-Agnoli, *The Labor Market Experience and Impact of Undocumented Workers* (Jun. 2008)

[16] Federation for American Immigration Reform, *Lower Wages for American Workers*, http://www.fairus.org/site/News2?page=NewsArticle&id=16973&security=1601&news_iv_ctrl=1017#end16

Arizona lost $1.4 Billion in wages in 2005 due to illegal immigration.[17] The hardest hit were those legal workers who are most vulnerable, low wage workers. Low wage workers earned 4.7% less in Arizona in 2005 because of unauthorized aliens taking jobs and suppressing wages. *Id.* American workers with college educations were harmed as well, losing on average about 1% of their income per worker. *Id.* The exploitative nature of illegal immigration further reduces wages through companies who pay unauthorized aliens even less than the legal minimum wage. So not only are American workers being pushed out of the labor market because of the increased number of workers, unauthorized aliens are being chosen over them because businesses can exploit the unauthorized aliens knowing that they have no recourse if the business pays them less than minimum wage. Strict enforcement of our nation's immigration laws through the assistance of Arizona's law (and others like it) will help American workers maintain fair wages and keep employed.

In addition, unfair business competition is created when businesses use black market labor of illegal immigration. When businesses cheat the system through these hires, they gain an advantage on their competitors in having lower costs as the result of paying wages below the minimum standard to illegal workers and as a result gain unfair advantage in the total cost of their goods, and thus

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[17] George Borjas, *Labor Market Consequences for illegal immigration in Arizona*, (Jan. 2008). See also, Congressional Testimony by Vernon Briggs, April 4, 2008, www.cis.org/articles/2008/briggstestimony040408.html.

unfair advantage in the bidding process with other companies. Businesses themselves have begun to fight this through litigation. Global Horizons filed suit in California against Munger Bros. and two of Global's competitors, Ayala Agricultural Services and J & A Contractors, claiming that Munger Bros. breached an agreement to hire 600 blueberry pickers through Global so that it could instead hire illegal aliens from the competition.[18] The suit eventually settled for 1.3 million. *Id.* Holding businesses accountable for hiring unauthorized aliens will prevent these unnecessary lawsuits and save millions of dollars in the long run. Arizona's laws punishing businesses who engage in these practices by suspending or revoking their business license provide a strong deterrent.

Furthermore, there are many public costs associated with illegal immigration. Arizona taxpayers pay about $1.3 billion annually in expenses associated with illegal immigration.[19] These costs include approximately $400 million in education of children who accompany their families to the U.S. *Id.* Uncompensated medical care outlays and healthcare costs for illegal aliens are estimated at $400 million a year. *Id.* Approximately $80 million is spent annually to house illegal aleins that have been incarcerated in the state. *Id.*

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[18] Peter Prengaman, *Business Owners Sue Firms Accused of Hiring Illegal Aliens*, Associated Press, Aug. 23, 2006.

[19] Federation for American Immigration Reform, *The Cost of illegal immigration to Arizonans*, http://www.fairus.org/site/DocServer/azcosts2.pdf?docID=101 (last visited Oct. 26, 2010).

Congress never intended that its attempt to "balance" new prohibitions on hiring unauthorized aliens with provisions to reduce burdens on employers and aliens authorized to work would end up with those Americans paying the price for low-cost labor for Petitioners. Congress wanted to end the hiring of unauthorized aliens. Petitioners have the tail wagging the dog.

Amicus respectfully requests this Court to remember those who are hurt by illegal immigration: low-income Americans, young people just starting in the job market, businesses who try to comply with the law by not hiring unauthorized aliens, and the unauthorized aliens themselves. Petitioners' arguments would harm those groups while helping only those who want to evade the prohibition on hiring unauthorized aliens.

That cannot have been Congress's intention in 1986 or later. Congress did not intend to preempt laws, like Arizona's, that harmonize with its original intent to stop illegal immigration.

CONCLUSION

For the foregoing reasons, *Amicus Curiae* respectfully request this Court to affirm the decision below.

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AMICUS CURIAE BRIEF

No. 09-115

In the Supreme Court of the United States

CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA, *et al.*,
Petitioners,

v.

MICHAEL B. WHITING, *et al.*,
Respondents.

On Writ of Certiorari
To the United States Court of Appeals
For the Ninth Circuit

BRIEF OF *AMICUS CURIAE* STATE SENATOR RUSSELL PEARCE IN SUPPORT OF RESPONDENTS

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INTEREST OF *AMICUS CURIAE*[1]

State Senator Russell Pearce of Arizona is the author of, and the driving force behind, the "Legal Arizona Workers Act."

During his years in the Arizona Legislature, Senator Pearce has authored numerous legislative initiatives designed to protect the State of Arizona from the adverse effects of unlawfully present aliens and, most importantly, to uphold the rule of law. These include the following: Proposition 100, a State constitutional amendment to deny bond to any person unlawfully present in the United States who commits a serious crime in Arizona; Proposition 102, which states that a person unlawfully present in the United States who sues an American citizen cannot receive punitive damages; Proposition 200, which requires individuals to produce proof of citizenship before they may register to vote; and "The Support Our Law Enforcement and Safe Neighborhoods Act" (known as "SB 1070"), which codifies as Arizona law certain already existing enforcement provisions of federal law. Senator Pearce's initiatives have served as models for similar legislation in numerous other States across the nation.

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[1] All parties consent to the filing of *amicus curiae* briefs in this matter. No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amicus curiae* or his counsel made a monetary contribution to its preparation or submission.

As author of the "Legal Arizona Workers Act," Senator Pearce has a direct interest in this matter and, therefore, respectfully submits this *amicus curiae* brief.

INTRODUCTION

The issues before this Court are straightforward and familiar. Petitioners assert that the "Legal Arizona Workers Act" is preempted by federal law regulating the employment of aliens. Nearly thirty-five years ago, however, this Court unequivocally affirmed that States possess broad authority under their police powers to regulate employment even if such regulation touches on immigration. *De Canas v. Bica*, 424 U.S. 351, 356 (1976). To date, this decision has not been overruled or even questioned.

Despite this well-established precedent, Petitioners assert that the State of Arizona lacks the authority to penalize employers for hiring unauthorized workers, allegedly because the legislation burdens employers. In other words, employers who put profits over patriotism by hiring unlawfully present aliens would be "burdened" by losing the substantial benefit of paying sub-standard wages. These same employers would be "burdened" by having to comply with tax laws related to social security, unemployment, and medicare, as well as occupational health and safety standards that they currently avoid.

Contrary to Petitioners' disingenuous claims, Senator Pearce authored legislation that is consistent

with federal law. The "Legal Arizona Workers Act" prohibits employers from knowingly or intentionally employing unauthorized workers. Additionally, all Arizona employers must use the federal "E-Verify" program to confirm the employment eligibility of new employees. The "Legal Arizona Workers Act" falls wel within the traditional police powers of the State. This Court therefore must reject Petitioners' attempt to protect scofflaw employers at the expense of legal Arizona workers by overturning well-established law.

SUMMARY OF ARGUMENT

The "Legal Arizona Workers Act" is not preempted by federal law. The legislation falls comfortably within the State's fundamental police powers as it regulates the employment relationship to protect workers within the State. The unauthorized worker provisions and the E-Verify mandate merely enable the State to exercise enforcement authority concurrent with that of the federal government. Petitioners therefore cannot overcome the presumption against preemption and cannot show that the State of Arizona has protected its citizens in a manner that hypothetically conflicts with federal objectives.

ARGUMENT

I. Our Constitution Establishes a System of Dual Sovereignty.

"As every schoolchild learns, our Constitution establishes a system of dual sovereignty between the States and the Federal Government." *Gregory v.*

Ashcroft, 501 U.S. 452, 457 (1991). Under our federal system, "the States possess sovereignty concurrent with that of the Federal Government, subject only to limitations imposed by the Supremacy Clause." *Id.* (*citing Tafflin v. Levitt*, 493 U.S. 455, 458 (1990)). Hence, while the States have surrendered certain powers to the Federal Government, they retain "residuary and inviolable sovereignty." *Printz v. United States*, 521 U.S. 898, 919 (1997) (*quoting* THE FEDERALIST No. 39 (James Madison)). This Court has described this system of dual sovereignty as the following:

> The people of each State compose a State, having its own government, and endowed with all the functions essential to separate and independent existence . . . Without the States in union, there could be no such political body as the United States. Not only, therefore, can there be no loss of separate and independent autonomy to the States, through their union under the Constitution, but it may be not unreasonably said that the preservation of the States, and the maintenance of their governments, are as much within the design and care of the Constitution as the preservation of the Union and the maintenance of the National government. The Constitution, in all its provisions, looks to an indestructible Union, composed of indestructible States.

Gregory, 501 U.S. at 457 (*citing Texas v. White*, 74 U.S. 700 (1869), *quoting Lane County v. Oregon*, 74 U.S. 71 (1869)).

Under our system of dual sovereignty, States have the authority to act – including in areas touching on immigration – when States prohibit activity that is already prohibited under federal law. *Gonzales v. Peoria*, 722 F.2d 468, 474 (9th Cir. 1983) ("Where State enforcement activities do not impair federal regulatory interests concurrent enforcement activity is authorized."). More simply put, where "[f]ederal and local enforcement have identical purposes," preemption does not occur. *Id.* at 474. Or, as Judge Learned Hand succinctly explained, "[I]t would be unreasonable to suppose that [the federal government's] purpose was to deny itself any help that the States may allow." *Marsh v. U.S.*, 29 F.2d 172, 174 (2d Cir. 1928); *see also Lynch v. Cannatella*, 810 F.2d 1363, 1367 (5th Cir. 1987) ("No statute precludes other federal, State, or local law enforcement agencies from taking other action to enforce this nation's immigration laws.").

Senator Pearce carefully crafted the "Legal Arizona Workers Act" to ensure that it did not impair federal regulatory interests and did no more than authorize the State to exercise enforcement authority concurrent with that of the federal government. The "Legal Arizona Workers Act" exercises the State of Arizona's authority as a dual sovereign and protects authorized workers in Arizona by regulating employment standards.

II. Regulation of Employment is a Fundamental Police Power of the States.

For nearly thirty-five years it has been undisputed that "States possess broad authority under their police powers to regulate the employment relationship to protect workers within the State." *De Canas*, 424 U.S. at 356; *see also Chicanos Por La Causa, Inc. v. Napolitano*, 544 F.3d 976, 984 (9th Cir. 2008) ("[T]he power to regulate the employment of unauthorized aliens remains within the States' historic police powers."). In *De Canas*, the State of California "sought to strengthen its economy" by enacting legislation to "protect California's fiscal interests and lawfully resident labor force from the deleterious effects on its economy resulting from the employment of illegal aliens." 424 U.S. at 357. California argued, and this Court agreed, that "[e]mployment of illegal aliens in times of high unemployment deprives citizens and legally admitted aliens of jobs [and] acceptance by illegal aliens of jobs on substandard terms as to wages and working conditions can seriously depress wage scales and working conditions of citizens and legally admitted aliens." *Id.* at 356-357. In reviewing the California legislation, this Court held, "These local problems are particularly acute in California in light of the significant influx into that State of illegal aliens from neighboring Mexico." *Id.* at 357.

The current situation in Arizona is strikingly similar to the conditions that existed in California during the 1970s at the time of *De Canas*. Arizona is not only suffering from high unemployment, it also is struggling with the effects of "rampant illegal

immigration." *United States v. Arizona*, 703 F. Supp. 2d 980, 985 (D. Ariz. 2010). Like the California Legislature in *De Canas*, the Arizona Legislature properly used its broad authority under its police powers to regulate employment. 424 U.S. at 356.

Moreover, Petitioners are simply incorrect when they assert that the "Legal Arizona Workers Act" attempts to regulate immigration. As this Court has stated, the mere fact that "aliens are the subject of a State statute does not render it a regulation of immigration." *De Canas*, 424 U.S. at 352-353. Regulation of immigration is "a determination of who should or should not be admitted into the country, and the conditions under which a legal entrant may remain." *Id.* at 355; *Toll v. Moreno*, 458 U.S. 1, 10 (1982) ("The authority to 'control immigration' is the power to 'admit or exclude aliens.'").

The "Legal Arizona Workers Act" plainly does not impose new restrictions on the manner in which an alien enters the country. Nor does it impose new conditions under which a legal entrant may remain in the country. The "Legal Arizona Workers Act" simply regulates employment standards by "target[ing] employers who hire illegal aliens." *Chicanos Por La Causa*, 544 F.3d at 979.

III. A Presumption against Preemption Exists.

Because the legislation solely regulates employment within the State, the "Legal Arizona Workers Act" falls comfortably within the scope of the State's traditional police powers. As this Court has

consistently held, "[p]reemption of employment standards 'within the traditional police power of the State' should not be lightly inferred." *Hawaiian Airlines, Inc. v. Norris*, 512 U.S. 246, 252 (1994) (*citing Fort Halifax Packing Co. v. Coyne*, 482 U.S. 1, 21 (1987)). Therefore, Petitioners must overcome a strong presumption against preemption.

Significantly, Petitioners fail to even address this presumption. As the Ninth Circuit correctly explained, "When Congress legislates 'in a field which the States have traditionally occupied . . . we start with the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress." *Chicanos Por La Causa*, 558 F.3d at 983 (*quoting United States v. Locke*, 529 U.S. 89, 108 (2000)); *see also Medtronic, Inc. v. Lohr*, 518 U.S. 470, 485 (1996) ("In all preemption cases . . . we start with the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was a clear and manifest purpose of Congress."); *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947); *Allen-Bradley Local v. Wisconsin Employment Bd.*, 315 U.S. 740, 749 (1942); *Napier v. Atlantic Coast Line R. Co.*, 272 U.S. 605, 611 (1926).

Finally, this Court has held that preemption must not be found absent clear congressional intent. "[W]e will not infer pre-emption of the States' historic police powers absent a clear Statement of intent by Congress." *Gade v. National Solid Wastes Management Ass'n*, 505 U.S. 88, 111-12 (1992) (Kennedy, J., concurring) (*citing Rice*, 331 U.S. at 230;

Jones v. Rath Packing Co., 430 U.S. 519, 525 (1977); and *English v. General Electric Co.*, 496 U.S. 72, 79 (1990)). Moreover, there is an "obligation to infer preemption only where Congress' intent is clear and manifest." *Cipollone v. Liggett Group*, 505 U.S. 504, 524 (1992) (Blackmun, J., dissenting).

This Court also relied on this same principle in *De Canas*:

> [F]ederal regulation . . . should not be deemed pre-emptive of State regulatory power in the absence of persuasive reasons—either that the nature of the regulated subject matter permits no other conclusion, or that Congress has unmistakably so ordained.

424 U.S. at 356 (*quoting Florida Lime & Avocado Growers v. Paul*, 373 U.S. 132, 142 (1963)). Since *De Canas* has not been overturned or even questioned, this Court should apply this long-standing principle and decline to infer preemption of Arizona's historic police powers.

IV. Petitioners Bring a Facial Challenge, which is the Most Difficult Challenge to Mount Successfully.

Not only do Petitioners ignore the presumption against preemption, Petitioners also ignore the fact that they have brought a facial challenge. Because there is no specific factual background under which the legislation can be analyzed, Petitioners cannot and

have not presented any evidence that the enforcement of the "Legal Arizona Workers Act" would actually frustrate the purposes of Congress.

As this Court has consistently explained, a "facial challenge to a legislative Act is, of course, the most difficult challenge to mount successfully, since the challenger must establish that no set of circumstances exists under which the Act would be valid." *United States v. Salerno*, 481 U.S. 739, 745 (1987). Or as the Ninth Circuit succinctly explained, "[A] speculative, hypothetical possibility does not provide an adequate basis to sustain a facial challenge." *Chicanos Por La Causa*, 558 F.3d at 866.

Facial challenges generally are disfavored because they rest on speculation, run contrary to the fundamental principal of judicial restraint, and threaten to "short circuit" the democratic process. *Washington State Grange v. Washington State Republican Party*, 552 U.S. 442, 449 (2008). When a legislative enactment is attacked facially, a court is at a disadvantage because it does not know how the law will be applied or construed by an enforcing authority. As this Court has declared, "It is neither our obligation nor within our traditional institutional role to resolve questions of constitutionality with respect to each potential situation that might develop." *Gonzalez v. Carhart*, 550 U.S. 124, 168 (2007).

As the Ninth Circuit explained:

> We uphold the statute in all respects against this facial challenge, but we must

> observe that it is brought against a blank factual background of enforcement and outside the context of any particular case. If and when the statute is enforced, and the factual background is developed, other challenges to the Act as applied in any particular instance or manner will not be controlled by our decision.

Chicanos Por La Causa, 558 F.3d at 980. Unless and until a factual background exists demonstrating that the goals of Congress have been frustrated, this Court should refrain from reaching conclusions based on hypotheticals.

CONCLUSION

For the foregoing reasons, Senator Pearce respectfully requests that this Court affirm the Ninth Circuit's decision and hold that the "Legal Arizona Workers Act" is not preempted by federal law.

Respectfully submitted,

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AMICUS CURIAE BRIEF

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IN THE

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Respondents.

On Writ of Certiorari
To the United States Court of Appeals
For the Ninth Circuit

BRIEF OF THE SERVICE EMPLOYEES INTERNATIONAL UNION AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

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BRIEF OF THE SERVICE EMPLOYEES INTERNATIONAL UNION AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

INTEREST OF *AMICUS CURIAE*

Amicus Curiae Service Employees International Union ("SEIU") is an international labor organization that represents more than two million working men and women employed in the private and public sectors. Many of SEIU's members are foreign-born American citizens and immigrant aliens authorized to work in the United States. As set out in SEIU's Constitution, it is an essential part of SEIU's mission to act as an "advocacy organization for working people" and to oppose, not only "discrimination based on gender, race, ethnicity, religion, age, sexual orientation and physical ability," but also discrimination on "immigration status."[1]

This case presents an important question concerning the meaning of the express preemption provision and its licensing exception in the employer sanctions section of the Immigration Reform and Control Act of 1986

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[1] The petitioners and the respondents have each filed a letter with the Court consenting to the filing of *amicus* briefs supporting either party. No counsel for a party authored this brief *amicus curiae* in whole or in part, and no person or entity, other than the *amicus*, made a monetary contribution to the preparation or submission of this brief.

("IRCA"), namely, the nature and extent of IRCA's preemptive force on State and local laws that, like that federal law, impose sanctions on employers who hire unauthorized aliens.[2] The SEIU represents workers employed in nearly every state and locality in the United States. The SEIU therefore has a strong interest in the uniform application of federal law prohibiting the employment of unauthorized aliens, as well as in the enforcement of those provisions of IRCA that protect workers from unlawful discrimination on the basis of national origin or citizenship during the employment verification process.

STATEMENT

On July 2, 2007, the Governor of Arizona signed into law the Legal Arizona Workers Act, Ariz. Rev. Stat. §§ 23-211 to 23-216. Among other things, the Arizona law: (i) prohibits employers in the State from "knowingly employ[ing] an unauthorized alien," *id.* § 23-212(A); (ii) provides that where an employer violates that prohibition, "the [state] court ... may order the appropriate [state] agencies to suspend all licenses ... that are held by the employer for not to exceed ten business days," *id.* § 23-212(F)(1)(d); and (iii) provides further that for a second violation, "the [state] court *shall* order the appropriate [state] agencies to permanently revoke all licenses that are held by the employer," *id.* § 23-212(F)(2) (emphasis added).

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[2] *Amicus* submits this brief to address only the first question presented in this case: "Whether an Arizona statute that imposes sanctions on employers who hire unauthorized aliens is invalid under a federal statute that expressly 'preempt[s] any State or local law imposing civil or criminal sanctions (other than through licensing and similar laws) upon those who employ, or recruit or refer for a fee for employment, unauthorized aliens.' 8 U.S.C. § 1324a(h)(2)." Cert. Pet., i. *Amicus* supports the position of petitioners on the other questions but does not write separately on them.

In this regard, the Arizona law defines the critical term "license" as "any agency permit, certificate, approval, registration, charter or similar form of authorization that is required by law and that is issued by any agency for the purposes of operating a business in th[e] state," *id.* § 23-211(9)(a), and in so doing adds that the term "license" includes "[a]rticles of incorporation" and "a certificate of partnership, a partnership registration or articles of organization," but excludes "[a]ny professional license," *id.* § 23-211(9)(b)&(c).

Petitioners sought to enjoin the Arizona law from going into effect, contending that the law's employer sanctions provisions are preempted by the federal Immigration Reform and Control Act of 1986 ("IRCA"), Pub. L. 99-603, 100 Stat. 3359. Specifically, Petitioners argued that the Arizona law is preempted by IRCA's express preemption provision, 8 U.S.C. § 1324a(h)(2), and is not saved by that provision's parenthetical exception for "licensing and similar laws." *Ibid.* The district court rejected this argument, concluding that the Arizona law "falls within the plain meaning of IRCA's savings clause," and denied Petitioners' request for an injunction. *Ariz. Contrs. Ass'n, Inc. v. Candelaria*, 534 F. Supp. 2d 1036, 1045-46 (D. Ariz. 2008).

On appeal, the Ninth Circuit held that the term "license" in the parenthetical exception to IRCA's preemption provision refers to any "permission, usually revocable, to commit some act that would otherwise be unlawful." Pet. App. 17a (quoting *Black's Law Dictionary* 938 (8th ed. 2004)). On this basis, the Ninth Circuit concluded that the Arizona law's "broad definition of 'license' is in line with the terms traditionally used and falls within the savings clause." *Ibid.*

SUMMARY OF ARGUMENT

Amicus address the first question presented in this

case: whether the Legal Arizona Workers Act's sanctions on employers who hire unauthorized aliens are preempted by IRCA's express preemption provision or saved by that provision's licensing-law exception.

When IRCA's preemption provision and that provision's licensing exception are construed together with the text of the law as a whole, it is apparent that the licensing exception saves only those State and local laws that are the same in nature, purpose, and effect as the State and local licensing laws Congress saved from preemption in the IRCA "Conforming Amendments to [the] Migrant and Seasonal Agricultural Worker Protection Act," ("AWPA") IRCA § 101(b), 100 Stat. 3359, 3372. AWPA is a federal licensing statute that is designed to, among other things, protect farmers and other agricultural business persons who do not hire their own employees—but who instead must rely on labor contractors or brokers to supply them with qualified workers—from unfit suppliers of such labor. The State and local licensing laws saved from preemption by the IRCA Conforming Amendments have the following characteristics:

> *First*, the State or local licensing law may impose a sanction on an employer for employing, recruiting or referring unauthorized aliens only on the basis of a prior determination by the appropriate Federal enforcement authority that the employer's action was in violation of IRCA.
>
> *Second*, the sole sanction that may be imposed by the State or local licensing law is denial, suspension or revocation of the license; the State or local law may not impose other civil or criminal sanctions, such as fines or imprisonment, for IRCA violations.
>
> *Finally*, the State or local licensing law must address employment issues as a central factor in determining

> the licensee's "'fitness to do business [],' such as state farm labor contractor laws or forestry laws, which specifically require such licensee or contractor to refrain from hiring, recruiting or referring undocumented aliens." H.R. Rep. No. 99-682, pt. I, at 58 (1986), reprinted in 1986 U.S.C.C.A.N. 5649, 5662. In other words, the licensing law must be one that, like the farm labor contractor laws, is centrally concerned with the licensee's fitness to engage *in the particular business of* hiring, recruiting or referring employees. A law licensing entities that engage in the hiring of labor for supply to others, or in the brokering of laborers, would be the paradigmatic example of such a law.

Because the Arizona law does not have the first or last of these characteristics, it is not a law of the type that is saved by the licensing exception to the IRCA general preemption provision and therefore is preempted.

ARGUMENT

I. THE LICENSING EXCEPTION TO THE IRCA PREEMPTION PROVISION SAVES FROM PREEMPTION ONLY THOSE STATE AND LOCAL LICENSING LAWS THAT ARE THE SAME IN NATURE, PURPOSE, AND EFFECT AS THE STATE AND LOCAL LICENSING LAWS CONGRESS SAVED FROM PREEMPTION IN THE IRCA "CONFORMING AMENDMENTS"

The Immigration Reform and Control Act of 1986 ("IRCA") both makes it "unlawful for a person or other entity ... to hire, or to recruit or refer for a fee, for employment ... an unauthorized alien" in specified circumstances, 8 U.S.C. § 1324a(a), and establishes a finely balanced enforcement scheme that accommodates important competing interests.

In particular, the IRCA enforcement scheme accommo-

dates the interests of employers in being free from strict liability, harsh penalties and burdensome regulation by, *inter alia*, including a scienter requirement (that the employer "knowing[ly]" hired an unauthorized alien), *id.* § 1324a(a)(1)(A); imposing moderate, rather than severe, penalties on violators, *id.* § 1324a(e)(4); and limiting the employer's affirmative duty to ascertain an employee's immigration status to the initial hiring phase of the employment relationship, *id.* § 1324a(b). And, IRCA accommodates the interests of employees who face the risk of discrimination on the basis of alienage by balancing § 1324a's ban on knowingly hiring unauthorized workers with § 1324b's prohibition against discrimination in employment on the basis of national origin or citizenship status. *Id.* § 1324b(g)(2)(B). In that regard, IRCA establishes a carefully calibrated scale of "civil money penalt[ies] for hiring, recruiting, and referral violations," 8 U.S.C. § 1324a(e)(4), that is precisely balanced with the civil money penalties for violations of IRCA's employment discrimination provision. 8 U.S.C. § 1324b(g)(2)(B).

Congress proceeded in this nuanced fashion on the understanding that a contrary regime that heavily penalized the employment of unauthorized aliens and did not equally penalize discrimination against authorized aliens would improperly skew employer decisionmaking: employers, acting out of economic self-interest, would be tempted to minimize their risk of being subjected to IRCA's employer sanctions by rejecting foreign-seeming job applicants without troubling to determine whether each particular applicant was or was not authorized to work in the United States. And Congress, in recognition that IRCA's carefully calibrated and balanced remedial scheme could not survive if the States and localities were free to strike their own balance of the competing interests informing the statute, expressly provided that IRCA "preempt[s] any State or local law imposing civil or criminal sanctions ... upon those who

employ, or recruit or refer for a fee for employment, unauthorized aliens." 8 U.S.C. § 1324a(h)(2).

At the same time, IRCA's preemption provision contains a parenthetical exception saving State or local sanctions for employing, recruiting or referring for a fee unauthorized aliens imposed "through licensing and similar laws." *Ibid.*[3] The critical question presented in this case is whether, as the Ninth Circuit believed, that is an expansive exception that overrides the general preemptive effect of IRCA so as to allow States and localities to freely adopt their own broadly applicable regimes for regulating unauthorized-alien hiring that are incompatible with IRCA's regulatory regime. The answer to that question is that the IRCA licensing exception does not allow the States and localities to adopt their own such regimes.

It is a well-settled principle of statutory construction that where a general provision is subject to an exception the "act is to be given such construction as will permit both the enacting clause and the proviso to stand and be construed together with a view to carry into effect the whole purpose of the law." *White v. United States*, 191 U.S. 545, 551 (1903), citing 1 Kent, *Commentaries on American Law* 463 (1826) ("The true principle undoubtedly is, that the sound interpretation and meaning of the statute, on a view of the enacting clause, saving clause, and proviso, taken and construed together, is to prevail.").

The Ninth Circuit did not even pay lip service to its obligation to construe IRCA's preemption provision and

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[3] IRCA's preemption provision states:

"Preemption. The provisions of this section preempt any State or local law imposing civil or criminal sanctions (other than through licensing and similar laws) upon those who employ, or recruit or refer for a fee for employment, unauthorized aliens." 8 U.S.C. § 1324a(h)(2).

its exception together with a view to carrying into effect the whole purpose of the law. Instead, the Ninth Circuit sought only to construe the term "licensing" in isolation. And the Court of Appeals, relying entirely on a single dictionary definition, held that the term "licensing" encompasses all State or local laws concerning "a governmental body's process of issuing a license" – in the sense of granting "a permission ... to commit some act that would otherwise be unlawful" – and that all such laws "fall[] within the savings clause" and are "therefore exempt[] ... from express preemption." Pet. App. 17a (internal quotations, brackets and citations omitted).

Under the Ninth Circuit's reading of IRCA's preemption provision and its exception, State and locals laws may *not* impose *any* sanction "upon those who employ, or recruit or refer for a fee for employment, unauthorized aliens" through *non*licensing laws, but States and localities *may* freely impose the most severe possible sanctions on employers so long as they do so through any of the myriad State or local laws granting businesses "permission ... to commit some act that would otherwise be unlawful." *Ibid.* That reading of the licensing exception is untenable, for it negates IRCA's preemption provision in practical terms. It does so by granting State and local governments *carte blanche* to proceed on a totally arbitrary basis to impose sanctions that are discordant with IRCA's carefully calibrated and balanced remedial scheme on *virtually all employers* "for hiring, recruiting, and referral violations," 8 U.S.C. § 1324a(e)(4), inasmuch as virtually every employer is a "licensee" in the all but infinitely expansive sense of that term that Arizona adopted by including any business that must have articles of incorporation or other such generic permissions to do business within the ambit of its law.

In sum, the Ninth Circuit's reading of the statute ignores the rule that exceptions are not be read to under-

mine the enacting clause but rather so as to "permit both ... to stand ... together," *White*, 191 U.S. at 551; "ignore[s] the rule that, because statutes are not read as a collection of isolated phrases, '[a] word in a statute may or may not extend to the outer limits of its definitional possibilities,'" *Abuelhawa v. United States*, 556 U.S. ___, 129 S.Ct. 2102, 2103 (2009) (citations omitted), quoting *Dolan v. Postal Serv.*, 546 U.S. 481, 486 (2006); and ignores the salient point that this Court has "stressed that '[i]n expounding a statute, we must not be guided by a single sentence or member of a sentence, but look to the provisions of the whole law, and to its object and policy.'" *United States Nat. Bank of Ore. v. Indep. Ins. Agents of America, Inc.*, 508 U.S. 439, 455 (1993), quoting *United States v. Heirs of Boisdoré*, 8 How. 113, 122 (1849).

The Ninth Circuit's error is not only manifest, it is unwarranted. For there is a way to read IRCA's preemption provision and its licensing exception in a manner that heeds the pertinent principles of statutory construction and that, in so doing, preserves rather negates the essence of Congress's judgment that IRCA's employer sanctions regulatory regime should be finely calibrated and balanced so as to avoid tempting employers into national origin or citizenship discrimination. As we show in what follows, under these principles, the proper construction of IRCA's general preemption provision and its licensing exception, taking the two "together with a view to carry into effect the whole purpose of the law," is this: the licensing exception saves from IRCA preemption only those State and local "licensing and similar laws" that are the same in nature, purpose, and effect as the State farm labor contractor licensing laws Congress saved from preemption, as compatible with IRCA's carefully calibrated and balanced remedial scheme, in IRCA's "Conforming Amendments to [the] Migratory and Seasonal Agricultural Worker Protection Act," IRCA § 101(b), 100 Stat. 3359, 3372.

AWPA is a federal licensing law that is designed to, among other things, protect farmers and other agricultural business persons who do not hire their own workers—but who instead rely on labor contractors or brokers to supply them with qualified workers—from unfit suppliers of such labor. AWPA, prior to IRCA, prohibited farm labor contractors from hiring, recruiting or referring unauthorized aliens, AWPA § 106(a), 96 Stat. 2589-90, while saving from federal pre-emption "appropriate State [farm labor contractor licensing] law and regulation," *id.* at § 521, 96 Stat. 2599. And, as developed below, IRCA's "Conforming Amendments" changed AWPA—and, by extension, the "appropriate" State laws saved from AWPA preemption—in ways that reveal the purpose and meaning of the licensing exception to IRCA's general preemption provision. In particular, as we develop below, the Conforming Amendments reveal that the State and local licensing laws that the IRCA Congress intended to save through the licensing exception have three characteristics:

> *First*, the State or local licensing law may impose a sanction on an employer for employing, recruiting or referring unauthorized aliens only on the basis of a prior determination by the appropriate Federal enforcement authority that the employer's action was in violation of IRCA.
>
> *Second*, the sole sanction that may be imposed by the State or local licensing law is denial, suspension or revocation of the license; the State or local law may not impose other civil or criminal sanctions, such as fines or imprisonment, for IRCA violations.
>
> *Finally*, the State or local licensing law must address employment issues as a central factor in determining the licensee's "'fitness to do business [],' such as state farm labor contractor laws or forestry laws, which specifically require such licensee or contractor to

refrain from hiring, recruiting or referring undocumented aliens." H.R. Rep. No. 99-682, pt. I, at 58 (1986), reprinted in 1986 U.S.C.C.A.N. 5649, 5662. In other words, the licensing law must be one that, like the farm labor contractor laws, is centrally concerned with the licensee's fitness to engage *in the particular business of* hiring, recruiting or referring employees. A law licensing entities that engage in the hiring of labor for supply to others, or in the brokering of laborers, would be the paradigmatic example of such a law.

II. THE IRCA CONFORMING AMENDMENTS AND THEIR STATUTORY BACKGROUND

A. The Migrant and Seasonal Agricultural Worker Protection Act of 1983

IRCA's conforming amendments to the Migrant and Seasonal Agricultural Worker Protection Act, as we have indicated, provide the key to determining the scope and meaning of the IRCA general preemption provision's licensing exception. In order to understand the changes that the IRCA conforming amendments made to AWPA and their significance, it is first necessary to understand what AWPA as it was originally enacted provided.

AWPA, like its predecessor, the Farm Labor Contractor Registration Act of 1963 ("FLCRA"), Pub. L. 88-582, 78 Stat. 920 (1964), comprehensively regulated farm labor contractors, defined as "any person ... who, for any money or other valuable consideration paid or promised to be paid ... recruit[s], solicit[s], hir[es], employ[s], furnish[es], or transport[s] any migrant or seasonal agricultural worker." AWPA, §§ 3(6) & (7), 96 Stat. 2584.

AWPA required farm labor contractors to obtain a certificate of registration from the Secretary of Labor and to carry the certificate of registration "at all times while

engaging in farm labor contracting activities." *Id.* at § 101(c), 96 Stat. 2587. The Secretary of Labor could "refuse to issue or renew, or ... [could] suspend or revoke a certificate of registration" if a farm labor contractor failed to comply with the substantive requirements of the Act, such as the requirements relating to the payment of wages, *id.* at § 202, 96 Stat. 2591, and the provision of housing and safe transportation, *id.* at §§ 203, 401, 96 Stat. 2591, 2594, and the requirements relating to convictions for certain crimes, including designated felonies, *id.* at § 103(a)(5), 96 Stat. 2588.

AWPA also permitted the Secretary of Labor to institute administrative proceedings within the Department of Labor against a farm labor contractor's certificate of registration if the contractor violated AWPA's freestanding "prohibition against employing illegal aliens." *Id.* at § 106, 96 Stat. 2589-90. And, AWPA allowed the Secretary of Labor in those administrative proceedings to impose civil money penalties on farm labor contractors who employed unauthorized aliens. *Id.*, § 503, 96 Stat. 2596-97. In such actions, a Department of Labor administrative law judge would determine whether a farm labor contractor had in fact employed unauthorized aliens. *Ibid.*; *see also Garcia v. Sec'y of Labor*, 10 F.3d 276, 277 (5th Cir. 1993); *Counterman v. United States Dep't of Labor*, 776 F.2d 1247, 1248 (5th Cir. 1985) (reviewing ALJ decision under the FLCRA).

Of particular relevance here, AWPA – like its predecessor the FLCRA – provided that the federal farm labor contractor law "is intended to supplement state law, and compliance with this Act shall not excuse any person from compliance with appropriate State law and regulation." AWPA § 521, 96 Stat. 2599; *see also* FLCRA § 12, 78 Stat. 924. In *De Canas v. Bica*, 424 U.S. 351 (1976), this Court noted that this provision constituted "persuasive

evidence that the I[mmigration and] N[ationality] A[act] should not be taken as legislation by Congress expressing its judgment to have uniform federal regulations in matters affecting employment of illegal aliens." *Id.* at 362. In other words, the *De Canas* Court concluded that the FLCRA "appropriate State law" provision constituted a non-preemption clause. Based on *De Canas*, prior to IRCA, at least eight States enacted statutes requiring the licensing or registration of farm labor contractors. *See* W. Gary Vause, *The Farm Labor Contractor Registration Act*, 11 STETSON L. REV. 185, 200 (1982). Some of these laws specifically included the knowing employment of an unauthorized alien as a ground for State action against a contractor's license or certificate of registration, *see, e.g.*, Or. Rev. Stat. § 658.440(2)(d) (1979); 43 Pa. Cons. Stat. § 1301.505 (1986), while others simply piggy-backed on federal farm labor contractor registration requirements, *see, e.g.*, Cal. Labor Code § 1690 (1986).

B. The Immigration Reform and Control Act's "Conforming Amendments to [the] Migrant and Seasonal Agricultural Worker Protection Act"

IRCA's "Conforming Amendments to [the] Migrant and Seasonal Agricultural Worker Protection Act," § 101(b), 100 Stat. 3372, harmonized IRCA's new general prohibition on the employment of unauthorized aliens with AWPA's preexisting prohibitions on the employment of illegal aliens by farm labor contractors. In so doing, Congress paid particular attention to two questions: What is the proper scope of authority of a farm labor contractor licensing body with regard to regulating the contractor's hiring of unauthorized aliens? And, what is the proper preemption rule with regard to State farm labor contractor licensing laws that parallel the federal licensing law in regulating the employment of unauthorized aliens?

As to the first question, IRCA's conforming amendments repealed the freestanding AWPA provision that made it a violation of AWPA for a farm labor contractor to "recruit, hire, employ, or use, with knowledge, the services of any individual who is an [illegal] alien[]," AWPA § 106(a), 96 Stat. 2589-90, repealed by IRCA § 101(b)(1)(B)(iii), 100 Stat. 3372. This amendement left farm labor contractors subject only to IRCA's prohibition of general application against "hir[ing], ... recruit[ing] or refer[ring] for a fee ... an unauthorized alien." 8 U.S.C. § 1324a(a). And, IRCA and its conforming amendments had two important effects on the Secretary of Labor's authority as licensor. Both result from AWPA provisions granting the Department of Labor only the administrative authority to adjudicate violations of, and levy civil penalties to enforce, rules of conduct unique to AWPA (as opposed to rules of conduct imported from other statutes), *see* AWPA § 503, 96 Stat. 2596 (civil money penalties may be imposed against "any person who commits a violation *of this Act*" (emphasis added)).

First, the Secretary of Labor could no longer make her own determination that a farm labor contractor had employed an illegal or unauthorized alien, but, pursuant to another of IRCA's conforming amendments, *see* IRCA § 101(b)(1)(B)(iii), 100 Stat. 3372, instead could only sanction a contractor that "*has been found* to have violated paragraph (1) or (2) of section 1324a(a) of Title 8," 29 U.S.C. § 1813(a)(6) (emphasis added), i.e., that has been found through the IRCA administrative adjudicatory process to "ha[ve] violated subsection (a) [of IRCA's employer sanctions provision]" by "hir[ing], recruit[ing] [or] refer[ring]" an unauthorized alien. 8 U.S.C. § 1324a(e)(3)).[4]

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[4] IRCA delegated responsibility to the Attorney General to establish procedures for the administrative adjudication of complaints against employers for violations of IRCA's prohibition on the

Second, the Secretary of Labor could no longer levy civil money penalties on contractors who hired illegal aliens. Instead, after IRCA, the Secretary can only sanction a farm labor contractor who employs unauthorized aliens in violation of IRCA by "refus[ing] to issue or renew, or ... suspend[ing] or revok[ing], a certificate of registration." 29 U.S.C. § 1813(a)(6).

As the Department of Labor helpfully summarized in its preamble to regulations implementing the IRCA changes to AWPA:

> "Enactment of IRCA made the prohibition against the knowing employment of unauthorized workers applicable to all employers. The prohibition became part of the Immigration and Nationality Act (INA) and was removed from [AW]PA. Determinations regarding the status of aliens are the responsibility of the Immigration and Naturalization Service (INS) and are subject to regulations issued by that agency. Accordingly, [AW]PA regulations are amended to reflect the changes required by IRCA. It should be noted, however, that a determination by INS that a farm labor contractor has knowingly employed an unauthorized alien is still a basis for DOL action regarding that contractor's certificate of registration." Migrant and Seasonal Agricultural Worker Protection Regulations, 54 Fed. Reg. 13326, 13326 (Mar. 31, 1989) (codified at 29 C.F.R. pt. 500).

That is, after IRCA, the Department of Labor can no

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employment of unauthorized aliens. IRCA § 101a(e), 100 Stat. 3365-66 (codified at 8 U.S.C. § 1324a(e)). Such complaints are heard by administrative law judges in the Office of the Chief Administrative Hearing Officer, a section of the Department of Justice's Executive Office for Immigration Review. 28 C.F.R. pt. 68. IRCA also required "the designation in the [Immigration and Naturalization] Service of a unit which has, as its primary duty, the prosecution of cases of violations of [8 U.S.C. § 1324a(a)]." IRCA § 101a(e)(1)(D), 100 Stat. 3366.

longer determine whether a farm labor contractor had employed illegal aliens, since such "[d]eterminations ... are the responsibility of the Immigration and Naturalization Service (INS)." *Ibid.* And the Department of Labor can no longer issue civil money penalties against a farm labor contractor for employing unauthorized aliens, although IRCA made clear that it can still take "action regarding that contractor's certificate of registration." *Ibid.*

As to the second question, IRCA's conforming amendments to AWPA maintained AWPA's non-preemption clause for "appropriate State law and regulation" relating to the licensing of farm labor contractors. AWPA § 521, 96 Stat. 2599 (codified at 29 U.S.C. § 1871). Thus, IRCA's conforming amendments to AWPA's provisions express Congress's judgment to save from preemption, as compatible with IRCA's remedial scheme, State farm labor contractor licensing laws that conform to the AWPA and to IRCA itself with regard to licensors' authority to regulate the employment of unauthorized aliens. *See Adams Fruit Co. v. Barrett*, 494 U.S. 638, 648 (1990) ("Although [29 U.S.C. § 1871] permits States to supplement [AWPA]'s remedial scheme, it cannot be viewed as authorizing States to replace or supersede its remedies."). In contrast, IRCA's Conforming Amendments express Congress' judgment that State farm labor contractor licensing laws that do not so conform are not saved from preemption by the AWPA clause that saves "appropriate" State law and regulation. *Ibid.* ("[C]ongressional authorization of a federal remedy may affect the balance struck in state regulatory schemes.").

III. THE CORRECT READING OF THE LICENSING EXCEPTION IN THE IRCA PREEMPTION PROVISION TAKING PROPER ACCOUNT OF THE IRCA "CONFORMING AMENDMENTS" TO THE FARM LABOR CONTRACTOR LICENSING LAWS

As we will show in the succeeding sections, IRCA's con-

forming amendments to AWPA place two clear limits on the State farm labor contractor licensing laws that are saved from preemption by AWPA as amended by IRCA: (i) a limit on the imposition of licensing sanctions on an employer for the employment of unauthorized aliens to situations in which the employer "has been found to have violated [IRCA § 1324a(a)]" by the Federal agency charged with making such findings, 29 U.S.C. § 1813(a)(6); and (ii) a limit on the penalties that can be imposed against a farm labor contractor for employing unauthorized aliens to denial, suspension or revocation of a license.

Given that statutory guidance and the IRCA preemption provision's purpose, it follows that the IRCA preemption provision's licensing exception is to be read *in pari materia* with IRCA's conforming amendments to AWPA and governed by these same limits.

By the same token, given the guidance provided by the text of IRCA's preemption provision, IRCA's conforming amendments to AWPA, and the legislative history of federal farm labor contractor licensing law, it follows that the only "licensing" laws that are saved from IRCA preemption are licensing laws that, like AWPA and similar licensing laws regulating labor contractors and brokers, are centrally concerned with the licensee's fitness to engage *in the particular business of* hiring, recruiting, or referring employees.

A. The Required Predicate for "Imposing . . . Sanctions"

IRCA's conforming amendments to the AWPA licensing scheme and, by extension, to the "appropriate State [licensing] law[s] and regulation[s]" saved from AWPA preemption, limit the imposition of licensing sanctions for the employment of unauthorized aliens to situations in which the licensee "has been found to have violated

[IRCA § 1324a(a)]," 29 U.S.C. § 1813(a)(6), by the Federal agency charged with making such findings. The logic of IRCA as a whole and of its preemption provision in particular is that only State and local licensing laws that are in "conform[ity]" with IRCA in this regard are saved from preemption by the IRCA licensing exception.

IRCA amended AWPA and the "appropriate" State licensing laws saved by AWPA to ensure the integrity of the centralized Federal scheme for enforcing the prohibition on hiring unauthorized aliens created by IRCA. *See* Pet. Br. 28-34. IRCA was passed to ensure that "the immigration laws of the United States ... be enforced vigorously and *uniformly*." IRCA, § 115, 100 Stat. 3384 (emphasis added). In that regard, IRCA created a carefully-crafted uniform process for adjudicating violations of IRCA's employer sanctions provisions. This process included prosecution by the Immigration and Naturalization Service, IRCA § 101a(e)(1)(D), 100 Stat. 3366, a hearing before an administrative law judge with expertise in matters relating to the employment of unauthorized aliens, *id.*, § 101a(e)(3), 100 Stat. 3366, the possibility of administrative appellate review by the Attorney General, *id.*, § 101a(e)(6), 100 Stat. 3367, and access to federal judicial review in the Court of Appeals, *id.*, § 101a(e)(7), 100 Stat. 3367. As the Department of Labor correctly recognized in repealing its own administrative process for judging whether a farm labor contractor had employed illegal aliens, after IRCA, "[d]eterminations regarding the status of aliens are the responsibility of the Immigration and Naturalization Service." 54 Fed. Reg. at 13326.

It follows from the detailed amendments to the Federal and State farm contractor licensing law, designed to protect the "uniform[ity]" of IRCA's centralized scheme for enforcing the prohibition on hiring unauthorized aliens, that IRCA's licensing exemption cannot properly be read

to save from preemption other State and local licensing laws that authorize their own processes for determining whether an employer hired unauthorized aliens. To the contrary, the conclusion that follows from reading IRCA's preemption provision and its licensing exception *in pari materia* with IRCA's conforming amendments to AWPA is that only State or local licensing laws that, like AWPA itself, only provide for the imposition of sanctions for IRCA violations where the licensee "has been found to have violated [IRCA § 1324a(a)]," 29 U.S.C. § 1813(a)(6), by the Federal agency charged with making such findings are saved from preemption.

B. The Type of "Sanctions" that May Be Imposed "Through Licensing and Similar Laws"

Under IRCA's conforming amendments to AWPA, the only sanction that may be imposed for IRCA violations through State or local farm labor contractor licensing laws is to "refuse to issue or renew, or ... suspend or revoke" a license or registration, 29 U.S.C. § 1813(a)(6); a State or locality may not impose civil money penalties or imprisonment through its licensing laws. Again, there is every reason to conclude that only the State and local licensing laws that are in "conform[ity]" with IRCA in this regard are saved from preemption by IRCA licensing exception.

IRCA's amendments to AWPA stripped the Department of Labor of its authority to impose civil money penalties against farm labor contractors that employed unauthorized aliens and, by operation of AWPA's provision that saves only "appropriate State law[s]" from preemption, 29 U.S.C. § 1871, denied States the authority to issue civil money penalties against farm labor contractors for similar violations of State farm labor contractor licensing laws as well. The rationale for eliminating separate civil money penalties under AWPA and State farm labor contractor licensing laws

was to preserve the integrity of IRCA's carefully calibrated scale of civil money penalties. *See* Pet. Br. 6-8. In particular, IRCA precisely balanced its "civil money penalt[ies] for hiring, recruiting, and referral violations," 8 U.S.C. § 1324a(e)(4), with its civil penalties for violating IRCA's prohibition of employment discrimination based on national origin or citizenship status, 8 U.S.C. § 1324b(g)(2)(B).

Having conformed Federal and State farm labor contractor licensing law to IRCA's careful balance of civil penalties for employer sanctions violations and anti-discrimination violations by prohibiting civil money penalties for AWPA violations relating to the employment of unauthorized aliens, Congress most certainly did not intend the IRCA preemption provision's licensing exception to save from preemption State or local licensing laws that impose civil money penalties – including penalties well in excess of those authorized by IRCA – for hiring unauthorized aliens in violation of that licensing law.

Thus, IRCA's preemption provision and its licensing exception are properly to be read *in pari materia* with IRCA's conforming amendments as providing that to be saved from preemption a State or local licensing law may only permit the licensor to deny, suspend or revoke a license as a sanction for hiring unauthorized aliens and may not impose the sanction of civil money or criminal penalties.

C. The Type of "Licensing and Similar Laws" that are Saved from IRCA Preemption

IRCA's preemption provision and its licensing exception, when read against the background of "the provisions of the whole law, and ... its object and policy," *United States Nat. Bank of Ore.*, 508 U.S. at 455, provides that the State and local licensing laws saved from IRCA preemption are the kind of licensing laws saved from AWPA

preemption as compatible with IRCA's remedial scheme in IRCA's conforming amendments to AWPA, i.e., licensing laws that make a regulated entity's employment practices a central factor in determining the entity's "'fitness to do business [],' such as state farm labor contractor laws or forestry laws, which specifically require such licensee or contractor to refrain from hiring, recruiting or referring undocumented aliens." H.R. Rep. No. 99-682, pt. I, at 58 (1986), reprinted in 1986 U.S.C.C.A.N. 5649, 5662. In other words, the licensing laws saved from preemption are the laws that are centrally concerned with the licensee's fitness to engage *in the particular business of* hiring, recruiting or referring employees—licensing laws for employers such as those in the business of labor contracting or brokering.

(i) While Arizona asserts that IRCA's preemption "savings clause is not tied to a limited definition of license," Opp. Cert. 15, the State then goes on to suggest, at least implicitly, that the savings clause is limited to State and local laws concerned with the granting of business licenses. That suggestion is certainly a sensible starting point for construing the savings clause, but it still leaves that clause at war with the IRCA preemption provision itself.

On Arizona's view, the licensing exception would give States and localities *carte blanche* to impose sanctions on any licensed employer that are vastly disproportionate to those provided for in IRCA. For example, while IRCA provides that the "civil penalty" for a first violation shall be "not less than $250 and not more than $2,000 for each unauthorized alien," 8 U.S.C. § 1324a(e)(4)(A), Arizona's interpretation would allow a State or local government to revoke any license held by the first-time violator, thereby putting the IRCA violator out of business. Indeed, on Arizona's view, nothing would prevent a State from taking the course pursued by South Carolina, "imput[ing] a[n] ...

employment license ... permit[ting] a private employer to employ a person in this State" upon "any person carrying on any employment," and then revoking this single-purpose license if the employer is found to have violated IRCA. *See* S.C. Code Ann. 41-8-20.

Arizona advances that view without offering any explanation—much less a rational one—as to why Congress would have intended to expose all licensed employers to draconian State and local sanctions for violating IRCA while protecting all unlicensed employer IRCA violators from any State or local sanction whatsoever. And Arizona's failure to do so is the plainest indication that there is no such explanation and that Congress could not possibly have intended that result.

Arizona's view is utterly incompatible with maintaining IRCA's meticulously balanced penalties for violations of its employer sanctions and anti-discrimination provisions. The IRCA conferees stated clearly that "[t]he antidiscrimination provisions of this bill are a complement to the sanctions provisions, and must be considered in this context." H. Conf. Rep. No. 99-100 (1986), reprinted in 1986 U.S.C.C.A.N. 5840, 5842. In fact, Congress made the antidiscrimination provisions dependent on "the sanctions [being] in effect; if the sanctions are repealed ..., the antidiscrimination provisions will also expire, the justification for them having been removed." *Id.* at 5842-43; *see* IRCA § 102(k)(1), 100 Stat. 3379. Obviously, neither IRCA's sanctions nor antidiscrimination provisions have been repealed. Rather, Congress has amended IRCA to precisely "conform[] [IRCA's] civil money penalties for anti-discrimination violations to those for employer sanctions," Immigration Act of 1990, Pub. L. 101-649, § 536, 104 Stat. 4978, 5055, making the graduated scales of penalties for first, second and repeat violations of each provision identical. *Compare* 8 U.S.C. §

1324a(e)(4)(A)(i)-(iii) *with* 8 U.S.C. § 1324b(g)(2)(B)(iv)(I)-(III).

There is no imaginable reason why Congress would have intended all employers who are subject to State or local business licensing laws – e.g., barbers, electrical contractors, restaurants, and commercial trucking firms – to be subject to disproportionately severe penalties for violating IRCA's employer sanctions provision (with no correspondingly heightened penalty for violating IRCA's anti-discrimination provisions), while entirely exempting from State and local sanctions employers not subject to state licensing – such as most retail, service and manufacturing firms. Arizona's reading of the exception to IRCA's preemption provision – as saving any business licensing law that includes sanctions for hiring unauthorized aliens – cannot be correct.

(ii) IRCA's preemption provision is expressly addressed to any "State or local law imposing civil or criminal sanctions ... upon those who employ, or recruit or refer for a fee for employment, unauthorized aliens." 8 U.S.C. § 1324a(h)(2). The "licensing" exception to this provision is, therefore, best understood as limited to those licensing laws that grant permission to engage in a business activity for which hiring, recruiting or referring practices, including hiring, recruiting and referring practices with respect to unauthorized aliens, are central to the overall fitness determination.

Farm labor contractor licensing law provides the relevant paradigm. The fact that IRCA's conforming amendments to AWPA specifically preserved the authority of the Department of Labor – and thus the authority of the States – to "refuse to issue or renew, or ... suspend or revoke a certificate of registration" of any farm labor contractor who "has been found to have violated [IRCA § 1324a(a)]," 29 U.S.C. § 1813(a)(6), demonstrates that

Congress understood that the hiring of unauthorized aliens is relevant to the fitness of farm labor contractors to engage in the business of "recruiting, soliciting, hiring, employing, furnishing, or transporting ... migrant or seasonal agricultural worker[s]." 29 U.S.C. § 1802(6). The legislative history of federal farm labor contractor licensing further demonstrates why this is so.

Congress enacted the Farm Labor Contractor Registration Act to, among other things, address "irresponsible labor contractors" who "exploited ... farmers." S. Rep. No. 88-202 (1963), reprinted in 1964 U.S.C.C.A.N. 3690, 3690; *see also* 128 Cong. Rec. S24090 (daily ed. Sept. 17, 1982) (statement of Chairman Hatch) ("The [FLCRA] hearings ... showed that itinerant crew leaders at times victimized agricultural employers."). Because "the primary users of [seasonal farm] labor – farmers, growers, and packing shed operators have experienced great difficulty in obtaining a sufficient supply of agricultural labor [] directly[,] ... the [farm labor] contractor has been permitted to exercise an inordinate amount of leverage over the workplace situation." S. Rep. No. 93-1295 (1974), reprinted in 1974 U.S.C.C.A.N. 6441, 6442. For example, a Department of Labor survey revealed farm labor contractors "accepting transportation advances from employers and failing to report to work or reporting with a smaller crew than contracted for." 1964 U.S.C.C.A.N. 3692. In other cases,

> "The contractor would agree to arrive with a crew on a designated date, and simply fail to show up because better opportunities presented themselves elsewhere. This would leave the farmer with no help to harvest his ripening crop. More common is the practice of leaving after the first picking when the second and third pickings become more difficult, and consequently less profitable." 1974 U.S.C.C.A.N. 6442.

Farm labor contractors' provision of unauthorized aliens to agricultural employers presented a particular problem because when a contractor supplied a farmer with illegal alien workers during peak season, the farmer was at risk of losing his work crew – and, as a result, his "ripening crop" – to an immigration raid. *See* P. L. Martin, *Good Intentions Gone Awry: IRCA and U.S. Agriculture*, 534 ANNALS AM. ACAD. POL. & SOC. SCI. 44, 49 (1994) ("Before IRCA, the INS enforced immigration laws in agriculture by having the Border Patrol drive into fields and apprehend aliens who tried to run away."). The loss of seasonal workers during peak season could be catastrophic, since many farmers "rel[ied] ... heavily on labor contractors and maintain[ed] only a skeleton core labor force." REPORT ON THE COMMISSION ON AGRICULTURAL WORKERS 46 (Nov. 1992); *see also* 128 Cong. Rec. S24090 ("[A] farmer ... would [] face financial ruin if he could not get help to harvest his crop in time"). One study quoted by the IRCA-required Commission on Agricultural Workers, *see* IRCA § 304, 100 Stat. 3431, for example, showed that the production of each acre of cantaloupes "require[d] 1 to 2 hours of 'regular' labor per month in the off-season, but 180 hours of 'temporary' labor at peak harvest." REPORT ON THE COMMISSION ON AGRICULTURAL WORKERS 46 n. 9, citing J. Mamer & A. Wilkie, SEASONAL LABOR IN CALIFORNIA AGRICULTURE: LABOR INPUTS FOR CALIFORNIA CROPS (1990).

Against this backdrop, AWPA, and analogous State laws, required farm labor contractors to make "a showing of moral and fiscal responsibility" in order to receive a certificate of registration, 1974 U.S.C.C.A.N. 6443, such as not having been convicted of certain crimes and maintaining required insurance. *See* 29 U.S.C. § 1813(a)(1)–(6). And, because Congress reasonably identified farm labor contractors' hiring, recruiting and referring practices

with respect to unauthorized aliens as critical to the fitness of farm labor contractors to "recruit[], solicit[], hir[e], employ[], furnish[], or transport[] migrant or seasonal worker[s]," 29 U.S.C. § 1802(6), IRCA's conforming amendments to AWPA permitted the Secretary of Labor (and State licensing authorities) to "refuse to issue or renew, or ... suspend or revoke a certificate of registration" of any farm labor contractor who "has been found to have violated [IRCA § 1324a(a)]." 29 U.S.C. § 1813(a)(6).

As the legislative material makes plain, Congress saved State farm labor contractor licensing laws from preemption to ensure that State licensing authorities could deny, suspend or revoke the licenses of farm labor contractors who hired unauthorized aliens in order to protect the interests of those farmers and other agricultural business persons who used the contractors' services. Congress' focus on creating an exemption from IRCA's preemption regime for State licensing laws of this type supports the conclusion that the licensing exception to the IRCA general preemption provision was intended to save State and local licensing laws that address employment issues as a central factor in determining the licensee's fitness to engage in the particular business of hiring, recruiting or referring employees. That conclusion is reinforced by the proposition that a defined and delimited exception of that kind not only is consistent with how Congress drafted IRCA's conforming amendments to AWPA, but also accords IRCA's general preemption provision its proper scope and role in protecting IRCA's remedial scheme.

In this regard, two points warrant special emphasis.

First, whereas the class of economic entities that require some form of permission from a State or local government to operate as a business enterprise—and that therefore count as "licens[ees]" who, according to the Ninth Circuit, can freely be subject to draconian sanc-

tions for any act of employing unauthorized aliens—is so large as to encompass virtually the entire universe of employers in the United States, the class of economic entities who are labor contractors or brokers, and hence who, are engaged in the particular business of employing, recruiting or referring employees is relatively small and manageable.

This point is important because, given the extraordinary effort that Congress put into enacting a carefully balanced and uniform regulatory scheme that prohibited the employment of unauthorized aliens without simultaneously encouraging employment discrimination against foreign-seeming American citizens and lawful aliens, it would be absurd to read IRCA's licensing exception in such a way as to allow it to destroy the statute's preemption rule and, with it, the careful balance of interests that the rule was designed to preserve—particularly when there is another reading that keeps the exception within manageable bounds.

Second, and of equal importance, there is a principled justification for exempting from a rule of uniformity in the area covered by IRCA the class of business enterprises composed of companies that are in the very business of hiring employees to supply to others—the class composed of labor contractors. That justification is that, unlike in the case of the general run of IRCA-regulated employers, the hiring decisions made by labor contractors have a direct impact on other economic actors—the customers who purchase hired labor and who depend on labor contractors to provide them with a reliable and stable labor supply—and there is accordingly a discrete set of interests, independent of the interests balanced in IRCA generally but compatible with them, that regulations on the hiring practices of labor contractors operate to advance.

That this set of interests is discrete and independent of the interests balanced in IRCA generally is demonstrated by the fact that Congress had determined, well before it enacted the general ban in IRCA on employing unauthorized aliens, to enact the narrow and particularized ban on the hiring of such aliens by farm labor contractors. *See supra.* That this set of interests is compatible with IRCA and not destructive of its carefully balanced remedial scheme is demonstrated by the fact that Congress conformed AWPA to IRCA in the nuanced way that we have described *supra*, and did not opt to strip out of AWPA all AWPA-specific sanctions on AWPA licensees who violate IRCA.

Thus, reading the licensing exception to encompass State and local licensing laws that, like the federal farm labor contractor licensing law, regulate immigration-related employment practices *not* to set immigration policy generally, but rather to protect consumers of contracted-for labor from the types of sharp contractor practices that triggered pre-IRCA federal legislation in this area, accommodates an interest that, while not specifically accounted for in the substantive provisions of IRCA, is nevertheless compatible with IRCA. For that reason, it is not only State or local *farm* labor contractor licensing laws that are within the ambit of the licensing law exception, but any State or local contractor licensing law that regulates those in the particular business of supplying labor to others or of brokering labor and that does so, as does AWPA, in the interest of protecting the consumers of such purchased or brokered labor.

The sum of the matter is this. Reading the IRCA preemption provision and its licensing exception as allowing the States to regulate any employer of any kind to which they choose to give a business license is untenable, because it puts the exception at war with the preemption provision and authorizes the States to proceed in a scattershot and arbitrary way to cut a broad swath through

the carefully balanced and calibrated IRCA remedial scheme, and to do so without any justifying reason rooted in the statute. Conversely, reading the IRCA preemption provision and its licensing exception as allowing the States and localities to regulate through licensing laws only the hiring practices of labor contractors generalizes the lessons of the IRCA Conforming Amendments in a principled way that *does* have a justifying reason rooted in the statute, and that preserves the essence of the carefully balanced and calibrated IRCA remedial scheme.

(iii) Given the foregoing, the fact that the Arizona law permits state courts to determine whether an employer has hired unauthorized aliens *see* Pet. Br. 10-11 *and* that the Arizona law's definition of "license" reaches general purpose permissions to do business, such as articles of incorporation, that do not grant employers permission to engage in any specific business activity for which hiring, recruiting and referring practices with respect to unauthorized aliens is central to fitness – and hence do not resemble the labor contractor licenses granted by AWPA – are sufficient reasons to find the Arizona law preempted. That is because the Arizona law, by deeming virtually every business enterprise in the state to be a "licensee," simply substitutes Arizona's judgment as to an appropriate employer sanctions regime for Congress' finely calibrated judgment as expressed in IRCA, and thereby would, if upheld, make IRCA's general preemption provision all but a dead letter.

CONCLUSION

The judgment of the Ninth Circuit should be reversed.

Respectfully submitted,

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